CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 **JULY 20, 1994** **NO. 29**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 174

(T.D. 94–55)

PERMITTED FORMS OF SIGNATURES ON PROTESTS

RIN 1515–AB52

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations regarding what Customs will consider to be an acceptable method of identifying the filer of a protest filed to contest a Customs decision regarding imported merchandise. The current regulations require that a protest be signed by the person filing the protest. In light of advances in methods of communication and the movement of Customs toward automation in all aspects of its operations, Customs will now accept methods of identification on protests and amendments to protest forms other than those which are handwritten in ink. The document also amends the regulations to allow amendments of protests to have the same types of identification as original protests.

EFFECTIVE DATE: August 8, 1994.

FOR FURTHER INFORMATION CONTACT: Ms. Rose Johnson, Office of Trade Operations, (202) 927–0376.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514), establishes the procedures which the public can use to administratively contest Customs decisions with respect to imported merchandise. Procedures for filing protests of decisions of district directors, including the legality of all orders and findings, are set forth in §§ 174.11–174.16 of the Customs Regulations. Section 174.12 (c) currently requires that protests "be signed by the person filing the protest, or his agent, or attorney."

Customs has determined that requiring handwritten signatures on protests is unnecessary. Customs published a Notice of Proposed Rulemaking which appeared in the Federal Register (58 FR 50300) on September 27, 1993, proposing to permit filing of protests without requiring actual handwritten signatures on the protest. Customs stated, in the proposal, that as long as a protest contains all the pertinent information (see § 174.13, Customs Regulations), and is filed in accordance with all other requirements of §§ 174.11 and 174.12, Customs Regulations, including identifying the filer, the requirement of a handwritten signature serves no other purpose than to sometimes delay the filing of an already prepared protest by a protestant. A protest must be submitted within the time limit set forth in § 174.12(e), Customs Regulations.

As indicated in the proposal, another reason for no longer requiring a handwritten signature on protests is that Customs is developing, as part of its Automated Commercial System (ACS), a protest module which will enable protests to be filed electronically. Requiring a handwritten signature on an electronic transmission would be self-defeating, if not impossible. Although the module is not presently available, reference to the module (electronic certification) was made in the proposal. This was done to prevent multiple changes to the same section within a short period of time. Before the ACS protest module does become available, another Notice of Proposed Rulemaking will be published which will provide detailed information and instructions for its use and how the electronic certification is intended to operate.

Analysis of Comments

In response to the Notice of Proposed Rulemaking, Customs received no comments which addressed the amendment as proposed. Customs did receive comments which anticipated the introduction of the protest module in ACS. Because that issue will be the subject of a different regulatory initiative before that particular module is activated, those comments are premature.

Amendment of the Regulations

In accordance with the above, Customs is now amending its regulations to permit the filing of a protest without requiring actual handwritten signatures on the protest. If the protest filer is not the importer of record or consignee, it will not be necessary, at this time for the protest filer to provide a filer number. Customs will accept protests which contain signatures which are facsimile, telefax, typed, or stamped, and, when the protest module is available for use, electronic certification in ACS.

Because Customs already accepts similar formats of signatures in certain situations, it is not anticipated that any abuses or great confusion will arise, nor should it create any increased burden of any segment of the public.

Customs is also amending § 174.14(d) so that the requirements which apply to signatures on amendments of protests will conform to those for the original protest.

EXECUTIVE ORDER 12866 AND REGULATORY FLEXIBILITY ACT

This document is not a "significant regulatory action" within the meaning of E.O. 12866. Based on the supplementary information set forth above and pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 174

Customs duties and inspection, Administrative practice and procedure.

AMENDMENT

Part 174, Customs Regulations (19 CFR Part 174), is amended as set forth below.

PART 174—PROTESTS

1. The general authority citation for Part 174 continues to read as follows:

Authority: 19 U.S.C. 66, 1514, 1515, 1624.

2. Paragraph (c) of § 174.12 is revised to read as follows:

§ 174.12 Filing of protests.

* * * * * * *

(c) *Identity of filer.* The identity of the person filing the protest or his agent, or attorney shall be noted on the protest. This may be accomplished through a signature which is handwritten in ink, stamped, typed, facsimile, telefax, or by electronic certification in ACS. If the person filing the protest is not the importer of record or consignee, the filer shall include his address and importer number, if any.

* * * * * * *

3. Paragraph (d) of § 174.14 is revised to read as follows:

§ 174.14 Amendment of protests.

* * * * * * *

(d) *Identification of filer.* An amendment to a protest may be filed only by the person who originally filed such protest or his agent or attorney subject to the provisions of § 174.3. The identity of the filer shall be noted on the amendment to a protest. Any acceptable method used to identify the filer described in § 174.12 (c) as being acceptable on a protest will be acceptable on an amendment to a protest.

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: June 17, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 8, 1994 (59 FR 34970)]

(T.D. 94–56)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: JULY 1 THROUGH SEPTEMBER 30, 1994

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.728800
Austria	Schilling	0.089268
Belgium	Franc	0.030460
Brazil	Cruzado	N/A
Canada	Dollar	0.723484
China, P.R.	Renminbi yuan	0.114941
Denmark	Krone	0.159962
Finland	Markka	0.188235
France	Franc	0.183251
Germany	Deutsche mark	0.627943
Hong Kong	Dollar	0.129374
India	Rupee	0.031875
Iran	Rial	N/A
Ireland	Pound	1.520000
Italy	Lira	0.000631
Japan	Yen	0.010151
Malaysia	Dollar	0.383907
Mexico	Peso	0.294551
Netherlands	Guilder	0.559785
New Zealand	Dollar	0.597500
Norway	Krone	0.143699
Philippines	Peso	N/A
Portugal	Escudo	0.006104
Singapore	Dollar	0.273823
South Africa, Republic of	Rand	0.656599
Spain	Peseta	0.007614
Sri Lanka	Rupee	0.020387
Sweden	Krona	0.127877
Switzerland	Franc	0.748783
Thailand	Baht (tical)	0.039936
United Kingdom	Pound	1.539000
Venezuela	Bolivar	N/A

Dated: July 1, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 94–57)

FOREIGN CURRENCIES

Daily Rates for Countries not on Quarterly List for June 1994

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

Greece drachma:

June 1, 1994	$0.004100
June 2, 1994	.004050
June 3, 1994	.004005
June 6, 1994	.004024
June 7, 1994	.004024
June 8, 1994	.004005
June 9, 1994	.003986
June 10, 1994	.003994
June 13, 1994	.004018
June 14, 1994	.004066
June 15, 1994	.004045
June 16, 1994	.004049
June 17, 1994	.004107
June 20, 1994	.004137
June 21, 1994	.004145
June 23, 1994	.004133
June 24, 1994	.004175
June 27, 1994	.004193
June 28, 1994	.004188
June 29, 1994	.004182
June 30, 1994	.004167

South Korea won:

June 1, 1994	$0.001236
June 2, 1994	.001235
June 3, 1994	.001235
June 6, 1994	.001235
June 7, 1994	.001235
June 8, 1994	.001235
June 9, 1994	.001235
June 10, 1994	.001235
June 13, 1994	.001235
June 14, 1994	.001235
June 15, 1994	.001234
June 16, 1994	.001235
June 17, 1994	.001235
June 20, 1994	.001235

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1994 (continued):

South Korea won (continued):

June 21, 1994	$0.001232
June 23, 1994	.001234
June 24, 1994	.001235
June 27, 1994	.001235
June 28, 1994	.001234
June 29, 1994	.001235
June 30, 1994	.001237

Taiwan N.T. dollar:

June 1, 1994	$0.036928
June 2, 1994	.036996
June 3, 1994	.036934
June 6, 1994	.036921
June 7, 1994	.036914
June 8, 1994	.036931
June 9, 1994	.036914
June 10, 1994	.036957
June 13, 1994	.036962
June 14, 1994	.036975
June 15, 1994	.036972
June 16, 1994	.036968
June 17, 1994	.036965
June 20, 1994	.036970
June 21, 1994	.036982
June 23, 1994	.037064
June 24, 1994	.037010
June 27, 1994	.037158
June 28, 1994	.037150
June 29, 1994	.037222
June 30, 1994	.037290

Dated: July 1, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 94–58)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JUNE 1994

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 94–35 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: None.

Austria schilling:

June 20, 1994	$0.088763
June 21, 1994	.089220
June 22, 1994	.088532
June 23, 1994	.088793
June 24, 1994	.089631
June 27, 1994	.090093
June 28, 1994	.089922
June 29, 1994	.089770
June 30, 1994	.030647

Belgium franc:

June 17, 1994	$0.030139
June 20, 1994	.030331
June 21, 1994	.030479
June 22, 1994	.030230
June 23, 1994	.030331
June 24, 1994	.030600
June 27, 1994	.030760
June 28, 1994	.030694
June 29, 1994	.030637

Denmark krone:

June 17, 1994	$0.158316
June 20, 1994	.159160
June 21, 1994	.159974
June 22, 1994	.158629
June 23, 1994	.159058
June 24, 1994	.160565
June 27, 1994	.161368
June 28, 1994	.161095
June 29, 1994	.160823
June 30, 1994	.160720

France franc:

June 20, 1994	$0.182882
June 21, 1994	.183537
June 22, 1994	.182000
June 23, 1994	.182598

FOREIGN CURRENCIES—Variances from quarterly rates for June 1994 (continued):

France franc (continued):

June 24, 1994	$0.183773
June 27, 1994	.184911
June 28, 1994	.184502
June 29, 1994	.184247
June 30, 1994	.183976

Germany deutsche mark:

June 20, 1994	$0.624610
June 21, 1994	.627746
June 22, 1994	.622665
June 23, 1994	.624688
June 24, 1994	.630318
June 27, 1994	.633714
June 28, 1994	.632511
June 29, 1994	.631433
June 30, 1994	.630915

Ireland pound:

June 15, 1994	$1.488500
June 16, 1994	1.488500
June 17, 1994	1.499500
June 20, 1994	1.510000
June 21, 1994	1.516000
June 22, 1994	1.505000
June 23, 1994	1.513000
June 24, 1994	1.524300
June 27, 1994	1.532000
June 28, 1994	1.530000
June 29, 1994	1.523000
June 30, 1994	1.526300

Japan yen:

June 30, 1994	$0.010151

Netherlands guilder:

June 17, 1994	$0.553802
June 20, 1994	.557414
June 21, 1994	.560036
June 22, 1994	.555710
June 23, 1994	.557476
June 24, 1994	.562493
June 27, 1994	.564908
June 28, 1994	.563889
June 29, 1994	.562841
June 30, 1994	.562715

New Zealand dollar:

June 1, 1994	$0.594200
June 2, 1994	.593300
June 3, 1994	.594300
June 6, 1994	.593000
June 20, 1994	.595000
June 21, 1994	.595300
June 22, 1994	.593600
June 30, 1994	.595000

FOREIGN CURRENCIES—Variances from quarterly rates for June 1994 (continued):

Norway krone:

June 20, 1994	$0.143637
June 21, 1994	.144363
June 22, 1994	.143215
June 23, 1994	.143637
June 24, 1994	.144854
June 27, 1994	.145476
June 28, 1994	.145159
June 29, 1994	.144812
June 30, 1994	.006112

Portugal escudo:

June 21, 1994	$0.006058
June 24, 1994	.006102
June 27, 1994	.006157
June 28, 1994	.006150
June 29, 1994	.006140

Spain peseta:

June 27, 1994	$0.007687
June 28, 1994	.007675
June 29, 1994	.007686
June 30, 1994	.007637

Switzerland franc:

June 20, 1994	$0.740741
June 21, 1994	.743771
June 22, 1994	.037102
June 23, 1994	.742115
June 24, 1994	.750751
June 27, 1994	.757002
June 28, 1994	.753012
June 29, 1994	.751033
June 30, 1994	.750469

United Kingdom pound:

June 24, 1994	$1.551900
June 27, 1994	1.549500
June 28, 1994	1.551200
June 30, 1994	1.548300

Dated: July 1, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., July 5, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A SUNSHELTER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a sunshelter. Notice of proposed revocation was published May 25, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 21.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after September 19, 1994.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Textile Classification Branch, Office of Regulations and Rulings (202–482–7050).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 25, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 21, proposing to revoke New York Ruling Letter (NYRL) 837034, issued March 2, 1989, by the Area Director of Customs, New York Seaport, concerning the tariff classification of a nylon sun-

shelter in subheading 6307.90.9030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Interested parties were invited to submit comments. No comments were received.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), (hereinafter section 625), this notice advises interested parties that Customs is revoking NYRL 837034 to reflect proper classification of the sunshelter in subheading 6306.22.9030, HTSUSA, which provides for other tents made of synthetic fibers. A copy of the ruling revoking NYRL 837034 is Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 5, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., July 5, 1994.

CLA–2 CO:R:C:T 956042 BC
Category: Classification
Tariff No. 6306.22.9030

MR. HERB TYLER
SUNSHELL DESIGNS, INC.
DIVISION OF IMAGINEERING CANADA
1678 West 2nd Ave.
Vancouver, B.C. Canada V6J1H3

Re: Revocation of New York Ruling Letter (NYRL) 837034; classification of the "Sunshell"; sun and wind shelter; beach shelter; sun protector; tent; backpacking tent; HRL 955304.

DEAR MR. TYLER:

The Customs Service recently had reason to reexamine the classification determination in NYRL 837034, dated March 2, 1989, issued to Sunshell Designs, Inc. After careful review, we have decided that the classification of the "Sunshell" was incorrect. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Cmplementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 837034 was published on May 25, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 21. We herein revoke that ruling as set forth below.

Facts:

In NYRL 837034, Customs classified a sun and wind shelter under subheading 6307.90.9030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA),

which then provided for other made-up articles of textile materials (subheading 6307.90.9986 in the current tariff). In the ruling, the shelter was described as the "Sunshell," "an open half-done sun/windscreen shelter with carry bag." In your request for the ruling, you described it as a "quick set-up beach canopy." It is constructed of woven nylon fabric fined on shock-corded fiberglass rods. It comes with plastic connectors, plastic pegs, and plastic cord locks. When folded, it is 29 and ½ inches long. When open, it provides shelter from the sun and wind, and can be used at the beach, in the park, in the yard, etc. it comes with a 31 inch long zipper carrying case made of the same nylon fabric.

Issue:

What is the proper classification for the subject nylon sunshelter?

Law and Analysis:

Recently, Customs classified a nylon sunshelter under subheading 6306.22.9030, HTSUSA, which provides for other tents of synthetic fibers. The sunshelter there classified was described in Headquarters Ruling Letter (HRL) 955304 (March 11, 1994) as follows:

> [A] nylon (woven fabric) shelter that offers protection from the wind and the sun at picnic areas and the beach. It is dome shaped, with three sides and a floor. It is open on one side, permitting entry and exit and allowing a view of surroundings while inside. When set up, the shelter measures 52 inches by 108 inches by 48 inches. The floor is 26 square feet. When disassembled and placed in a carrying case, it measures 4 inches by 28 inches.

It is clear that the shelter classified in HRL 955304 is substantially similar to the shelter classified in NYRL 837034.

The classification of goods under the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification is determined in accordance with the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining rules will be applied in sequential order. The Explanatory Notes (EN's) of the Harmonized Commodity Description and Coding System constitute the official interpretation of the nomenclature at the international level. While not legally binding, they represent the considered views of classification experts of the Harmonized System Committee. It has been the practice of the Customs Service to follow, whenever possible, the terms of the EN's when interpreting the HTSUS. (See Treasury Decision (T.D.) 89–80, wherein Customs stated that the EN's should always be consulted as guidance when classifying merchandise. 23 Cust. Bull. 379 (1989), 54 Fed. Reg. 35,127 (August 23, 1989).)

The EN's for heading 6306 provide the following regarding tents:

> Tents are shelters made of lightweight to fairly heavy fabrics of man-made fibres, cotton or blended textile materials, whether or not coated, covered or laminated, or of canvas. They usually have a single or double roof and sides or walls (single or double), which permit the formation of an enclosure. The heading covers tents of various sizes and shapes, e.g., marquees and tents for military, camping (including backpack tents), circus, beach use. They are classified in this heading, whether or not they are presented complete with their tent poles, tent pegs, guy ropes or other accessories.

It is clear that the scope of heading 6306 includes a wide variety of tents which, according to the EN above, are in fact shelters. The EN explicitly refers to shelters for beach use. Moreover, while many tents are constructed to form an enclosure, the scope of the heading is not limited to such tents. In HRL 955304, we stated the following regarding this issue:

> The fact that the shelters at issue are open on one side is not controlling. The EN first sets forth that tents are shelters. The definition of "shelter" is as follows: 1.a. Something providing cover or protection, as from the weather. b. A refuge: haven. 2. The state of being protected or covered. Webster's II New Riverside University Dictionary 1074 (1984). Clearly, shelters are not limited to closed structures. Also, one of the EN's examples of tents covered by heading 6306, HTSUSA, is "marquees." These are defined as follows: 1. A large open-sided tent, used chiefly for outdoor entertainment. *Id.* at 728. Thus, an open-sided shelter is considered a tent for tariff purposes. These terms ("shelter" and "marquees") show that tents of the heading are not limited to completely enclosed structures. Further, in describing the tent as an enclosure, the EN uses the non-exclusive qualifying term "usually." This means "not in all cases," which again indicates that tents of the heading are not limited to the enclosed type.

There is additional precedent for the position that sun and wind shelters are classifiable as tents. In Headquarters Ruling Letter (HRL) 951774, dated May 28, 1992, we stated the following regarding a sun/windscreen shelter: "In Customs view, the sun/windscreen shelter in question is a class or kind of merchandise similar to a tent or tent-like structure and is classifiable in heading 6306." For similar holdings, see HRL's: 953684 (April 26, 1993), concerning a cabana; 951814 (September 8, 1992), concerning a tent-like structure for protection from wind and sun on the beach or camping; and 089237 (May 10, 1991), concerning a beach cabana.

The shelter at issue is designed for use at the beach. Its purpose is to protect occupants from the wind and sun. It could be used for this purpose at picnics or in the backyard. It is not the kind of tent used for backpacking purposes. Such tents are designed to be used in the sport of backpacking, where participants hike long distances and survive against the elements by utilizing only those supplies they carry on their backs. (See *The Newman Importing Co., Inc. v. United States*, 76 Cust. Ct. 143, C.D. 4648 (1976).) Backpacking tents must be designed to stand up to the occasional severe weather (including hard and extended rain) that backpackers face. An open-sided shelter would not fulfill that purpose. The fact that a shelter may meet the guidelines for backpacking tents set forth in Treasury Decision (T.D.) 86–163, 20 Cust. Bull. 468, 470 (1986), is not necessarily determinative. We do not have sufficient information to permit us to here consider each guideline; yet, it is clear that the shelter at issue does not meet the first requirement under the guidelines: "It [the tent] must be specially designed for the sport of backpacking." As stated above, the shelter at issue was not designed for backpacking.

Based on the foregoing, we conclude that Customs classification of the shelter in NYRL 837034 under subheading 6307.90.9030, HTSUSA, was in error.

Holding:

The open-sided sunshelter at issue is classifiable under subheading 6306.22.9030, HTSUSA, as an other tent of synthetic fibers. The applicable duty rate is 10% *ad valorem;* the quota category is 669.

Accordingly, New York Ruling Letter 837034 is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from its date of publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF CERTAIN MEN'S UPPER AND LOWER BODY GARMENTS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act Pub. 1 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying two rulings pertaining to the tariff classification of certain men's upper and lower body garments. Notice of the proposed modification was published May 25, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 21.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after September 19, 1994.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Classification Branch, Office of Regulations and Rulings, (202–482–7050).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 25, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 21, proposing to modify two District Ruling Letters. The District Director of Newark, New Jersey issued (DD) 888389 on August 6, 1993, concerning the tariff classification of certain men's upper and lower body garments as track suits in subheadings 6211.33.0035, HTSUSA, and 6211.33.0030, HTSUSA, respectively. The District Director of Boston, Massachusetts issued DD 887738 on July 29, 1993, concerning the tariff classification of essentially identical garments as those described above in the same aforementioned subheadings. No comments were received from interested parties.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) , (hereinafter section 625), this notice advises interested parties that Customs is modifying two rulings DD 888389 and DD 887738 pertaining to the tariff classification of certain men's upper and lower body garments to reflect proper classification of these garments as water resistant separates in 6201.93.3000 and 6203.43.3500, HTSUSA, respectively.

The ruling modifying DD 888389 is set for in Attachment A and the ruling modifying DD 887738 is set forth in Attachment B to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 5, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., July 5, 1994.

CLA-2 CO:R:C:T 955634 CAB
Category: Classification
Tariff No. 6201.93.3000 and 6203.43.3500

MS. MARY JO MUOIO
WOLF D. BARTH CO. INC.
90 West Street
New York, NY 10006

Re: Request for Reconsideration of DD 888389, dated August 6, 1993; Classification of men's lower and upper body garments; Heading 6211; Heading 6201; Heading 6203; U.S. Additional Note 2, Chapter 62, HTSUSA; water resistant.

DEAR MS. MUOIO:

This is in response to your request dated November 1, 1993, for reconsideration of DD 888389, dated August 6, 1993, concerning the tariff classification of certain men's upper and lower body garments under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Your request is on behalf of Crystal Brands Men's Sportswear. A sample was submitted for examination.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 888389 was published May 25, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 21.

Facts:

The merchandise at issue is described as Style 91310. Style 91310 is comprised of a man's jacket and pants which are constructed of a 100 percent woven nylon shell fabric. The jacket contains a mesh lining, a full frontal opening with zipper closure, rib knit cuffs and waistband, and side slash pockets. The trousers feature an elasticized waistband with drawcord, side slash pockets, two back pockets with zipper closures, and elasticized ankles with zipper closures. The trousers also contain a mesh lining in the top half and a polyester lining in the bottom portion of the leg area.

DD 888389 classified the subject garments as a track suit under Heading 6211, HTSUSA. You now request that the subject garments be classified as water resistant separates due to a polyurethane coating added to the shell of the garments which renders them water resistant.

Issue:

Whether the garments in question are classifiable as a track suit under Heading 6211, HTSUSA, or whether they are classifiable as water resistant separates under the appropriate headings in Chapter 62, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6211 HTSUSA, is the provision for woven track suits. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), although not legally binding, are the official interpretation of the tariff at the international level. The EN to Heading 6211, HTSUSA state that track suits consist of two garments, one for the upper body and a pair of trousers, which, because of their general appearance and the nature of the fabric, are clearly meant to be worn exclusively or mainly in the pursuit of sporting activities.

The instant garments contain the general characteristics of a track suit. The attributes include the elasticized waistband, cuffs, and ankles, a lightweight lining that breathes and wicks away moisture, and shell fabric which is commonly used in the construction of track suits.

In your submission you state that the polyurethane coating applied to the exterior of the garments renders them water resistant for tariff purposes. You also submit a test report from a private testing laboratory confirming that the garments are water resistant for tariff classification purposes. Additional U.S. Note 2, Chapter 62, HTSUSA, provides, in pertinent part:

> [T]he term *"water resistant"* means that garments classifiable in those subheadings must have water resistance (see ASTM designations D 3600–81 and D 3781–79) such that, under a head pressure of 600 millimeters, not more than 1.0 gram of water penetrates after two minutes when tested in accordance with AATCC Test Method 35–1985. This water resistance must be the result of a rubber or plastics application to the outer shell, lining or inner lining.

The garments have the general appearance and characteristics of a track suit provided for under Heading 6211, HTSUSA. However, according to you the garments meet the water resistant test for separates provided at the subheading level of Chapter 62, HTSUSA.

In addition to having the characteristics of a track suit as described in the EN, to be properly classifiable as a track suit, garments must also be suitable for use during sporting activities. In this case, the extensive coating added to the garments' surface will not allow them to breathe and wick away moisture during sporting activities. Customs has consistently stated that a minimum prerequisite for garments suitable for wear during participation in sporting activities is that they be capable of breathing and wicking away perspiration. As the instant garments do not meet this minimum requirement, they are not classifiable as a track suit under Heading 6211, HTSUSA.

Since the jacket and pants do not meet the minimum requirement for classification as a track suit, the only other alternative is to classify them as separates in Chapter 62, HTSUSA. The jackets are properly classifiable under Heading 6201, HTSUSA, which provides for men's or boys' windbreakers and similar articles. The pants are properly classifiable under Heading 6203, HTSUSA, which provides for men's or boys' trousers. As the garments have a polyurethane coating added to their exterior that is said to be in accordance with Additional U.S. Note 2, Chapter 62, HTSUSA, they are classifiable under the applicable water resistant subheading.

Holding:

Based on the foregoing, provided the jacket passes the water resistance test of Additional U.S. Note 2, Chapter 62, HTSUSA, it is classifiable in subheading 6201.93.3000, HTSUSA, which provides for men's water resistant windbreakers and similar articles of man-made fibers. The applicable rate of duty is 7.6 percent *ad valorem* and the textile restraint category is 634.

Provided the trousers pass the water resistance test, they are classifiable in subheading 6203.43.3500, HTSUSA, which provides for men's water resistant trousers of man-made fibers. The rate of duty is 7.6 percent *ad valorem* and the textile restraint category is 647.

This ruling is a modification of DD 888389 under 19 CFR 177.9(d)(1).

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., July 5, 1994.

CLA–2 CO:R:C:T 955783
Category: Classification
Tariff No. 6203.43.3500 and 6201.93.3000

MARY JO MUOIO
WOLF D. BARTH COMPANY, INC.
90 West Street
New York, NY 10006

Re: Modification of DD 887738 of July 29, 1993: track suit vs. water resistant separates; Heading 6211; Heading 6203; Heading 6201.

DEAR MS. MUOIO:

This is in response to your inquiry of November 1, 1993, on behalf of Crystal Brands Men's Sportswear, requesting reconsideration of DD 887738, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), concerning certain men's upper and lower body garments. A sample was submitted for examination.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 887738 was published May 25, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 21.

Facts:

The sample submitted, Style 87304, is comprised of a man's jacket and pair of trousers which are constructed of 100 percent nylon fabric and lined with a mesh fabric. The jacket features a full frontal opening with a zipper means of closure, a stand-up collar, long sleeves with ribbed knit cuffs, ribbed knit bottom, and side seam pockets. The trousers contain an elasticized waistband with a drawstring, side seam pockets, a rear pocket, and ribbed knit ankle cuffs.

In the initial inquiry, you stated that the shell fabric used to make the subject garments would be coated with 500mm of polyurethane which would render the garments water resistant for tariff classification purposes. You also attached a copy of a laboratory report which indicated that the garments were water resistant in accordance with the water resistant provision of Additional U.S. Note 2, Chapter 62, HTSUSA. As a result of the added coating to the garments, you assert that they are properly classifiable as water resistant separates in Chapter 62, HTSUSA. In DD 887738, the District Director of Customs classified the garments as track suits provided for under Heading 6211, HTSUSA.

Issue:

Whether the subject garments were properly classified as a track suit under Heading 6211, HTSUSA, in DD 887738, or whether they are classifiable as water resistant separates under the appropriate headings in Chapter 62, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6211, HTSUSA, is the provision for track suits. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), although not legally binding, are the official interpretation of the tariff at the international level. The EN to Heading 6211, HTSUSA, state that track suits consist of two garments, one for the upper body and a pair of trousers, which, because of their general appearance and the nature of the fabric, are clearly meant to be worn exclusively or mainly in the pursuit of sporting activities.

The instant garments contain the general characteristics of a track suit. These attributes include the elasticized waistband and ribbed knit cuffs, a drawstring waist, a light-

weight mesh lining that breathes and wicks away moisture, and shell fabric which is commonly used in the construction of track suits.

Despite the garments' characteristics that would suggest classification as a track suit, you state that the garments are properly classifiable as water resistant separates due to the 500 mm of polyurethane coating applied to the exterior of the garments. Additional U.S. Note 2, Chapter 62, HTSUSA, provides, in pertinent part:

> [T]he term *"water resistant"* means that garments classifiable in those subheadings must have water resistance (see ASTM designations D 3600–81 and D 3781–79) such that, under a head pressure of 600 millimeters, not more than 1.0 gram of water penetrates after two minutes when tested in accordance with AATCC Test Method 35–1985. This water resistance must be the result of a rubber or plastics application to the outer shell, lining or inner lining.

In this case, the extensive coating added to the garments' surface will not allow them to breathe and wick away moisture during sporting activities. Customs has consistently stated that a minimum prerequisite for garments suitable for wear during participation in sporting activities is that they be capable of breathing and wicking away perspiration. As the instant garments do not meet this minimum requirement, they are not classifiable as a track suit under Heading 6211, HTSUSA.

Since the jackets and trousers do not meet the minimum requirements for classification as a track suit, the only alternative is to classify them as separates in Chapter 62, HTSUSA. The jackets are classifiable under Heading 6201, HTSUSA, which provides for men's or boys' windbreakers and similar articles. The trousers are classifiable under Heading 6203, HTSUSA, which provides for men's or boys' trousers. If the polyurethane coating applied to the surface of the garments meets the requirements of Additional U.S. Note 2, Chapter 62, HTSUSA, they will be classifiable as water resistant separates in Chapter 62, HTSUSA.

Holding:

Provided the jackets meet the requirements for water resistance in accordance with Additional U.S. 2, Chapter 62, HTSUSA, then the applicable subheading is 6201.93.3000, HTSUSA, which provides for other men's water resistant anoraks, windbreakers and similar articles of man-made fibers. The rate of duty is 7.6 percent *ad valorem* and the textile restraint category is 634. Provided the trousers meet the water resistance test, then the applicable subheading is 6203.43.3500, HTSUSA, which provides for other men's water resistant trousers of man-made fibers. The duty rate is 7.6 percent *ad valorem* and the textile restraint category is 647.

This notice to you should be considered a modification of DD 887738 under 19 CFR 177.9(d)(1).

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "QUIZ WIZ" ACCESSORIES

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of "Quiz Wiz" question booklet and answer cartridge accessories. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before August 19, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of "Quiz Wiz" question booklet and answer cartridge accessories.

In New York Ruling Letter (NY) 891428, issued on November 3, 1993, by the Area Director of Customs, New York Seaport, the "Quiz Wiz" question booklet and answer cartridge set was classified under subheading 9504.90.40, HTSUS, as accessories to game machines. NY 891428 is set forth as "Attachment A" to this document.

Customs Headquarters is of the opinion that classification of the "Quiz Wiz" question booklet and answer cartridge set under subheading 9504.90.40, HTSUS, as an accessory to a game is incorrect. Customs has previously determined that merchandise like the "Quiz Wiz" question booklet and answer cartridge set is not an accessory to an article for amusement, but for educational purposes.

Customs intends to revoke NY 891428 to reflect the proper classification of the merchandise as "goods put up in sets for retail sale" under

subheading 4901.99.00, HTSUS, which provides for: "[p]rinted books, brochures, leaflets and similar printed matter, whether or not in single sheets: [o]ther: [o]ther * * *."

Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling 955845 revoking NY 891428 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 30, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., November 3, 1993.

CLA–2–95:S:C:TOB:DO5–891428
Category: Classification
Tariff No. 9504.90.4000

MS. MONA WEBSTER
IMPORT CUSTOMS SPECIALIST
TARGET STORES
33 South Sixth Street
P.O. Box 1392
Minneapolis, Minnesota 55440–1392

Re: Classification of accessories for a hand-held game machine from China.

DEAR MS. WEBSTER:

In your letter dated October 9, 1993, you requested a tariff classification ruling.

Submitted with your request was a sample of a question book and an answer cartridge, style number 7–229–1. These items, which are packaged together, will be used as accessories for a hand-held electronic game called the "Quiz Wiz." The country of origin for the question book and answer cartridge will be China.

The applicable subheading for the question book and answer cartridge will be 9504.90.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for game machines, other than coin or token operated; parts and accessories thereof. The rate of duty will be 3.9 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R:C:M 955845 RFA
Category: Classification
Tariff No. 4901.99.00 and 8543.80.95

MR. PAUL S. ANDERSON
SONNENBERG, ANDERSON & RODRIGUEZ
200 South Wacker Drive, 33rd Floor
Chicago, IL 60606

Re: "Quiz Wiz" Educational Electronic Module with Question Booklet and Answer Cartridge; Separate Booklet/Cartridge Combinations; "Goods Put Up in Sets for Retail Sale"; Essential Character; GRI 3(b); Heading 9504; EN to Chapter 94; HQs 088494, 088694, 086577 and 088044; NY 891428, revoked.

DEAR MR. ANDERSON:

This is in response to your letter dated January 28, 1994, on behalf of Tiger Electronics, Inc., requesting reconsideration of NY 891428, dated November 3, 1993, involving the tariff classification of the "Quiz Wiz" question booklet and answer cartridge accessory set under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The three-component version of "Quiz Wiz" consists of an electronic module, one question booklet and an answer cartridge, which are imported into the United States packaged together for sale as a set. The electronic module operates on three "AA" batteries and is not designed for use with an A/C adapter. The user enters a question number and an answer choice (from the booklet) on the keyboard. The module (with cartridge inserted) indicates whether the answer is correct by a red or green flashing light, or by a simulated vocal response of "yes/no" or "right/wrong."

The question booklet/answer cartridge combination, which was the subject of NY 891429, will also be imported packaged together for sale as an accessory to the "Quiz Wiz". Each version of the booklet/cartridge combination covers one of twenty-four separate topics, including nature, animals, science sports, famous people, geography, travel, language, television, and movies. Each booklet contains 1001 questions, and corresponding answer choices for each question. Because the module does not keep score, score sheets are included in the booklets for manual score keeping. Each cartridge, which is a printed circuit board, relates to the subject matter of its corresponding booklet, and must be inserted in the electronic module for the module to provide responses to the user's booklet-guided input.

Issue:

Which component imparts the essential character of the two "Quiz Wiz" sets under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

In NY 891428, dated November 3, 1993, the Area Director of Customs, New York Seaport, determined that the question booklet/answer cartridge combination for the "Quiz Wiz" module was an accessory to a game machine classifiable under subheading 9504.90.40, HTSUS.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the Customs Cooperation Council's official interpretation of the HTSUS. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed.Reg. 35127, 35128 (August 23, 1989). The ENs to Chapter 95, page 1585, states as follows: "This chapter covers toys of all kinds whether designed for the *amusement* of children or adults." (emphasis added). Therefore, to be classifiable in chap-

ter 95, the merchandise must have the essential character of an article designed for the amusement of children or adults.

Customs has previously determined that electronic modules which teach functions such as spelling, math, picture identification, colors, shapes, matching and other basic academic skills, even if for the amusement of children and adults, fulfill an educational or learning function. Customs concluded that this type of merchandise was not covered within chapter 95, HTSUS. Because there is no provision in the HTSUS for "educational articles" per se, Customs would classify the electronic module under heading 8543, HTSUS, which provides for: "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere * * *." *See* HQ 088694 (July 10, 1991); HQ 088494 (April 19, 1991); HQ 086577 (May 4, 1990), for rulings involving similar articles.

The "Quiz Wiz is intended for use by children as well as adults to test and increase knowledge of facts and other information in an entertaining manner. Based upon the previous rulings listed above, we conclude that the "Quiz Wiz" is an "educational article" and therefore not classifiable under chapter 95, HTSUS.

Because there is no "educational articles" provision within the HTSUS, classification must be determined by application of the GRI's. However, neither version of the "Quiz Wiz" may be classified by reference to GRI 1 because each contains components that are classifiable in different headings. The electronic module is classifiable in heading 8543, HTSUS, as "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof." The answer cartridge, which is a printed circuit board in a plastic housing, is classifiable in heading 8534, HTSUS, as "[p]rinted circuits". The question booklet is classifiable in heading 4901, HTSUS, as "[p]rinted books, brochures, leaflets and similar printed matter, whether or not in single sheets."

Because classification in a single heading cannot be determined by applying GRI 1, we must apply the other GRI's. GRI 2(a) is not applicable here because the merchandise is not incomplete or unfinished. GRI 2(b) states that if a product is a mixture or combination of materials or substances that are, prima facie, classifiable in two or more headings, then GRI 3 applies.

GRI 3(a) provides in pertinent part:

> [t]he heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only * * * of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Because the electronic module, the answer cartridge, and the question booklet fall under separate headings in the tariff schedule which describe only a portion of the "Quiz Wiz", the headings are to be regarded as equally specific under GRI 3(a). Therefore, GRI 3(a) fails in establishing classification, and GRI 3(b) becomes applicable. GRI 3(b) provides as follows:

> [m]ixtures, composite goods * * * made up of different components, and goods put up in sets for retail sale, * * * shall be classified as if they consisted of the material or component which gives them their essential character.

EN X to GRI 3(b), page 4, provides a three-part test for "goods put up in sets for retail sale":

> [f]or the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:
>
> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

In the present situation, the merchandise consists of two or three different articles, which are *prima facie* classifiable under different headings. The merchandise is put up together to meet a particular need or carry out a specific activity; to test and increase knowledge of facts and other information. Both versions of the "Quiz Wiz", are packaged together for sale directly to the consumer without repacking. Therefore, both versions of

the "Quiz Wiz" are a set for tariff purposes. To determine the proper classification, the essential character of the "Quiz Wiz" sets needs to be determined.

EN VIII to GRI 3(b) provides the following guidance concerning the essential character determination:

> [t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

With respect to the two-component version of "Quiz Wiz," we note that the question booklet not only contains 1001 questions, but also reveals all the answer choices. The booklet has educational value even standing alone. The answer cartridge, on the other hand, must function with the module to pair answers with questions and express whether the user's choice is correct. We thus find that the question booklet provides the booklet/cartridge set with its essential character. *See* HQ 088044 (April 4, 1991), and HQ 086838 (July 3, 1990), for similar findings concerning the essential character of comparable, multiple Component articles. Therefore, the question booklet and answer cartridge set is classifiable under subheading 4901.99.0093, HTSUS, which provides for: "[p]rinted books, brochures, leaflets and similar printed matter, whether or not in single sheets: [o]ther: [o]ther, [o]ther: [o]ther: [o]ther: [c]ontaining 49 or more pages each (excluding covers)."

Looking to the three-component version of "Quiz Wiz," we find that the electronic keyboard module is the essential component of the retail set due to its greater bulk, size and its relation to the question booklet and answer cartridge. The electronic module is the focus of the user's "hands on" interaction with the whole article, and the component which provides the light or sound indication of a right or wrong answer. As evidenced by the availability of other cartridges and books as an accessory, the user would buy the "Quiz Wiz" for the electronic module with the option of purchasing additional question and answer accessories. Therefore, the three-component version of "Quiz Wiz" is properly classified in subheading 8543.80.95, HTSUS, which provides for: "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter * * * [o]ther machines and apparatus: [o]ther: [o]ther * * *".

Holding:

The two-component version of "Quiz Wiz," which consists of a question booklet and an answer cartridge, is properly classified in subheading 4901.99.0093, HTSUS, which provides for: "[p]rinted books, brochures, leaflets and similar printed matter, whether or not in single sheets: [o]ther: [o]ther, [o]ther: [o]ther: [o]ther: [c]ontaining 49 or more pages each (excluding covers)." The general, column one rate of duty is free.

The three-component version of "Quiz Wiz," which consists of an electronic keyboard module, a question booklet, and an answer cartridge, is properly classified in subheading 8543.80.95, HTSUS, which provides for: "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter * * *: [o]ther machines and apparatus: [o]ther: [o]ther * * *." The applicable duty rate is 3.9 percent ad valorem.

Effect on Other Rulings:

NY 891428, dated November 3, 1993, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

19 CFR Part 177

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A WOMEN'S SLIPPER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, (1993), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a woman's slipper. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before August 19, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W. Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Metals and Machinery Classification Branch, (202–482–7030).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057 (1993), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a woman's slipper.

In DD 891639 issued on November 5, 1993, by the Acting District Director of Customs, Portland, Oregon, a woman's open toe and open heel slipper with an outer sole and upper of rubber or plastics was classified under subheading 6402.99.30, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other footwear with outer soles and uppers of rubber or plastics, not covering the ankle, having uppers of which not over 90 percent of the external surface area is rubber or plastics, which is of the slip-on type. The ruling letter is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that DD 891639 erroneously classified the woman's slipper under subheading 6402.99.30, HTSUS, based on an incorrect measurement of the external surface area (ESAU) of the slipper's upper. Specifically, the ESAU of the slipper is over 90% plastics rather than not over 90% plastics. An ESAU measurement of over 90% plastics mandates classification of the slipper under subheading 6402.99.15, HTSUS.

Customs intends to revoke DD 891639 to reflect the proper classification of this footwear under subheading 6402.99.15, HTSUS, which provides for other footwear with outer soles and uppers of rubber or plastics, other, having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics, and not having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper.

Before taking this action, consideration will be given to any written comments timely received. Proposed HQ 956385 revoking DD 891639 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9) will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 27, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Portland, OR, November 5, 1993.

CLA–2–64:HS:CS FNIS D19 891639
Category: Classification
Tariff No. 6402.99.30

MAUREEN SHOULE
J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, N.Y. 10038

DEAR MS. SHOULE:

In your letter dated October 20, 1993, you request classification confirmation on a ladies polyurethane (plastics) wedge slide sandal with a EVA plastics sole. The shoe has open toes and open heels. The style number for the shoe is 9700. The shoe is made in China and will be imported through the ports of New York, New Orleans, Los Angeles, and Thong Beach, for F.W. Woolworth Co., New York, N.Y.

The applicable subheading for the shoe is 6402.99.30, other footwear with outer soles and uppers of rubber or plastics. The rate of duty is 37.5% ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling should be attached to the entry documents filed at the time this merchandise is imported. If the documents are filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

GENE LOWRANCE,
Acting District Director.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R:C:M 956385 DFC
Category: Classification
Tariff No. 6402.99.15

MS. MAUREEN SHOULE
J.W. HAMPTON, JR. & CO., INC.
15 Park Row
New York, N.Y. 10038

Re: Footwear; Slipper, woman's; Upper, external surface area; DD 891639 revoked.

DEAR MS. SHOULE:

Your letter dated February 22, 1994, addressed to the District Director of Customs in Portland, Oregon, on behalf of F. W. Woolworth Co, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of a woman's slipper produced in China, has been referred to this office for a response. Specifically, you ask that Customs reconsider the result reached in DD 891639 dated November 5, 1993, issued to you by the Acting District Director of Customs, Portland, Oregon, concerning the classification of this slipper.

Facts:

The sample shoe, identified as style 9700, is a woman's below the ankle, open toe and open heel slipper with an outer sole and upper of rubber or plastics. The external surface area of the upper (ESAU) is over 90% plastics.

In DD 891639 dated November 5, 1993, the Acting District Director of Customs, Portland, Oregon, ruled that style 9700 is classifiable under subheading 6402.99.30, HTSUS, which provides for other footwear with outer soles and uppers of rubber or plastics, not covering the ankle, having uppers of which not over 90 percent of the external surface area is rubber or plastics, other, footwear with open toes or open heels. The applicable rate of duty for this provision is 37.5% *ad valorem*.

The rationale for classifying the slipper under subheading 6402.99.30, HTSUS, was that the ESAU was not over 90% plastics.

You claim that style 9700 is properly classifiable under subheading 6402.99.15, HTSUS, which provides for other footwear with outer soles and uppers of rubber or plastics, other, having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics, and not having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper.

Issue:

Is the ESAU of style 9700 over 90% plastics?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and, provided such head-

ings or notes do not otherwise require, according to [the remaining GRI's taken in order]." In other words, classification is governed first by the terms of the headings of the tariff and any relative section or chapter notes.

Upon reconsideration of DD 891639, it is our observation that style 9700 was erroneously classified under subheading 6402.99.30, based on an incorrect measurement of its ESAU. Specifically, the ESAU of the slipper is over 90% plastics rather than not over 90% plastics. An ESAU measurement of over 90% plastics mandates classification of the slipper under subheading 6402.99.15, HTSUS.

Holding:

Style 9700 has an upper the ESAU of which is over 90% plastics.

Style 9700 is dutiable at the rate of 6% *ad valorem* under subheading 6402.99.15, HTSUS.

Accordingly, DD 891639 is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF BASE METAL FIGURES OF COMIC BOOK CHARACTERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NYRL) 874900, dated June 22, 1992, concerning the tariff classification of certain base metal figures of comic book characters.

DATE: Comments must be received on or before August 19, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street N.W., Suite 4000. Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the

North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of base metal figures of comic book characters.

In NYRL 874900, dated June 22, 1992, zinc figures about 2½ inches tall and 1 inch wide, representing the Batman, the Penguin, the Catwoman, and a Penguin Commando were classified under the provision for other statuettes and ornaments of base metal, subheading 8306.29.0000, Harmonized Tariff Schedule of the United States (HTSUS), with duty at the general rate of 5 percent ad valorem. The ruling letter is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that these figures, by reference to Rule 1 of the General Rules of Interpretation, HTSUS, are classifiable as dolls representing only human beings, whether or not dressed, not stuffed, and not over 33 cm in height, in subheading 9502.10.4000, HTSUS, with duty at the general rate of 12 percent ad valorem.

Customs intends to revoke NYRL 874900 to reflect the proper classification of the figures in subheading 9502.10.4000, HTSUS. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter 956407, revoking NYRL 874900, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 28, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y.

CLA–2–83:S:N:N1:113 874900
Category: Classification
Tariff No. 8306.29.0000

MR. ALLEN H. KAMNITZ
SHARRETTS, PALEY, CARTER AND BLAUVELT
67 Broad Street
New York, NY 10004

Re: The tariff classification of zinc figurines from China.

DEAR MR. KAMNITZ:

In your letter dated May 29, 1992, you requested a tariff classification ruling.

The merchandise is zinc figurines of popular comic book characters. The figurines are about 2½ inches tall and 1 inch wide. They represent the Batman, the Penguin, the Catwoman, and a Penguin Commando. They are designed to be sold to collectors.

The applicable subheading for the figurines will be 8306.29.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for statuettes and other ornaments of base metal. The rate of duty will be 5% ad valorem.

This ruling is being Issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R:C:F 956407 K
Category: Classification
Tariff No. 9502.10.4000

MR. ALLEN H. KAMNITZ
SHARRETTS, PALEY, CARTER AND BLAUVELT
67 Broad Street
New York, New York 10004

Re: Tariff Classification of Zinc Figures (Batman, etc.); Revocation of New York Ruling Letter (NYRL) 874900.

DEAR SIR:

In response to your letter dated May 29, 1992, the Customs Service issued NYRL 874900, dated June 22, 1992, which held that certain figures of base metal were classified in subheading 8306.29.0000, Harmonized Tariff Schedule of the United States (HTSUS), as statuettes and other ornaments of base metal. This letter is to inform you that NYRL 874900 no longer reflects the views of the Customs Service. The following represents our position.

Facts:

In NYRL 874900, the merchandise is desGRIbed as zinc figures of popular comic book characters. The figures are about 2½ inches tall and 1 inch wide. They represent the Batman, the Penguin, the Catwoman, and a Penguin Commando. They were claimed to be designed for collectors. In addition to the description in the ruling letter, we were provided with samples of the Batman and the Penguin Commando. The Batman and the Penguin Commando contain permanently molded irregular circular stands approximately ⅛ inch in thickness which permits each figure to stand by itself. There are no moveable parts. The figures are not designed to be attached to another item or to fit into another item such as a vehicle. These comic book characters are deemed to be representative of human beings wearing the garb of their characters. Therefore, they do not represent animals or other non-human creatures.

Issue:

The issue is whether the figures are classifiable as dolls, or as statuettes and other ornaments of base metal.

Law and Analysis:

NYRL 874900, dated June 22, 1992, held that the figures of the Batman, the Penguin, Catwoman, and the Penguin Commando were classified under the provision for other statuettes and other ornaments of base metal, subheading 8306.29.0000, HTSUS, with duty at 5 percent ad valorem. NYRL 874900 no longer reflects the views of the Customs Service and is revoked.

The General Rules of Interpretation (GRI's) taken in their appropriate order provide a framework for classification under the Harmonized Tariff Schedule of the United States (HTSUS). Most imported goods are classified by application of GRI 1, that is, according to the terms of the headings of the schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may be applied, taken in order. The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under HTSUS by offering guidance in understanding the scope of the headings and GRI's.

Subheading 9502.10.4000 provides for dolls, whether or not dressed, not over 33 cm in height, not stuffed and representing only human beings. The EN for heading 9502 states that "the heading includes not only dolls designed for the amusement of children, but also dolls intended for decorative purposes (e.g., boudoir dolls, mascot dolls), or for the use in Punch and Judy or marionette shows, or those of a caricature type." Further, the Explanatory Notes to Chapter 95, state that Chapter 95 "covers toys of all kinds whether designed for the amusement of children or adults."

The chapter notes of the HTSUS and the EN do not preclude the classification of the base metal figures of the Batman, the Penguin, the Catwoman, and the Penguin Commando under the provision for dolls, whether or nor dressed, not over 33 cm in height, not stuffed and representing only human beings, in subheading 9502.10.4000, HTSUS. Accordingly, we need not resort to the other GRI's to determine the classification of the figures in question. There is a series of rulings to support the classification of the figures as dolls.

In NYRL 841282, dated May 25, 1989, figures 3 inches tall composed of polyvinyl chloride with clearly distinguished human features and molded on wearing apparel reflecting positions with the railroad were classified as dolls under subheading 9502.10.4000, HTSUS. In NYRL 535580, dated January 25, 1989, plastic molded figures 1¾ inches, if imported separately from a toy set, were held to be dolls. In NYRL 847931, dated January 8, 1990, 2½ inch polyvinyl chloride "Peanuts" cartoon figures, "Charlie Brown" and "Lucy" with accessories such as a plastic tiller and wheelbarrow designed to be attached to the hands of the figures were classified on the basis of essential character (GRI 3(b)) as dolls and affirmed by Headquarters Ruling Letter (HRL) 086633, dated September 18, 1990, and reaffirmed by HRL 088895, dated March 22, 1993. In NYRL 855744, dated September 17, 1990, 3 inch and 4½ inch plastic figures of comic book characters "Colossus", "Hulk", and "Wolverine" were classified as dolls. In NYRL 855794, dated September 24, 1990, 4 inch and 3½ inch plastic figures of comic book characters "Daredevil" and "Scarlet Witch" were classified as dolls. In NYRL 833463, dated December 15, 1988, a 3 inch polyvinyl chloride figure of "Ronald McDonald" attached to a 2 inch star designed to glow in the dark was classified as a doll. In HRL 082001, dated February 13, 1990, 3½ to 5 inch plastic molded figures of sports personalities attached to plastic bases were classified as dolls under subheading 9502.10.40, rather than as other toys under subheading 9503.49.0020, or as statuettes of plastics under subheading 3926.40.0000. See also our recent ruling, Customs Headquarters Ruling Letter 952807, dated March 30, 1994.

Holding:

The figures of base metal, the Batman, the Penguin, the Catwoman, and the penguin commando, as described above, are classifiable as dolls representing only human beings, whether or not dressed, not stuffed, and not over 33 cm in height, in subheading 9502.10.4000, HTSUS, dutiable at the general rate of 12 percent ad valorem.

NYRL 874900, dated June 22, 1992, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PUBLIC MEETINGS IN BOSTON AND NEW YORK ON CUSTOMS AUTOMATED EXPORT SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of meetings.

SUMMARY: This notice announces the location and dates of public meetings to be held in Boston, MA, and New York, NY, on the development of the Automated Export System (AES). Dates and locations of further meetings on this subject will be scheduled and announced in a subsequent notice. These meetings are being held to (1) give Customs managers an opportunity to provide the public with information related to the development of AES and (2) give attendees an opportunity to ask questions, make suggestions, and provide Customs with informal ideas related to AES design and functionality. A notice published by Customs in the Federal Register on June 13, 1994 (59 FR 30383) announced that the first of these meetings would be held in Washington, D.C. on July 8, 1994. Customs is now announcing that AES meetings will be held in Boston, Massachusetts, on July 19, 1994 and in New York City on July 21, 1994. Those planning to attend a meeting are requested to so notify Customs in the city where the meeting will be held in advance.

DATES:

Boston: July 19, 1994, commencing at 2 p.m.

New York: July 21, 1994, commencing at 9 a.m.

ADDRESSES:

Boston: Thomas P. "Tip" O'Neil Federal Building Auditorium, 10 Causeway Street, Boston, MA 02222.

New York: 6 World Trade Center, Room 770, New York, NY 10048.

FOR FURTHER INFORMATION CONTACT:

Boston Meeting: James Knight, (617) 565–6242; Pre-registration Fax: (617) 565–6662.

New York Meeting: Susan Mitchell, (212) 466–4494; Pre-registration Fax: (212) 466–4507.

General AES Questions: Lorna Finley, AES Development Team, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 7331, Washington, DC., 20229, (202) 927–0280.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a notice published in the Federal Register on June 13, 1994, (59 FR 30383) Customs announced its intention of developing an Automated Export System (AES) and informed the public that a series of meetings would be held around the country regarding the AES. That notice provided information on the first such meeting which was scheduled in Washington, DC. This notice is being issued to inform the public of the date and time of meetings which will be held in Boston, MA and New York, NY.

Since AES is in the very early design stage, the AES Development Team intends to hold a series of public meetings for the purpose of (1) giving Customs managers an opportunity to provide the public with information related to the development of AES and (2) giving attendees an opportunity to ask questions, make suggestions, and provide Customs with informal ideas related to AES design and functionality. Each meeting will open with a short presentation on AES, past, present and future. After this presentation, the floor will be open to all attendees for general informal discussion of the AES program.

In this document, Customs is announcing the following public meetings on AES:

1. Boston, Massachusetts
   July 19, 1994, commencing at 2:00 p.m.
   Thomas P. "Tip" O'Neil Federal Building Auditorium
   10 Causeway Street
   Boston, MA 02222
   Point of Contact: Mr. James Knight (617) 565–6242
   Pre-registration Fax Number (617) 565–6662
2. New York, New York
   July 21, 1994, commencing at 9:00 a.m.
   6 World Trade Center
   Room 770
   New York, NY 10048
   Point of Contact: Ms. Susan Mitchell (212) 466–4494
   Pre-registration Fax Number (212) 466–4507

In order to ensure that overcrowding does not result, persons planning to attend a meeting are requested to preregister by contacting the individual identified as the contact person for the city where they plan on attending.

Additional public meetings on AES are planned for the following locations: Houston, Texas; New Orleans, Louisiana; Seattle, Washington; Los Angeles, California; and Portland, Oregon. Appropriate notice will be published in the Federal Register when the dates, times and specific locations for these meetings have been established.

Dated: July 5, 1994

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, July 8, 1994 (59 FR 35170)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–105)

CONOCO, INC. ET AL., PLAINTIFFS *v.*
U.S. FOREIGN-TRADE ZONES BOARD ET AL., DEFENDANTS

Court No. 90–06–00289

Plaintiffs move for judgment on the agency record to challenge certain conditions imposed by the United States Foreign-Trade Zones Board upon the grants of foreign-trade subzones to plaintiffs Conoco and Citgo. Defendants cross-move for judgment on the agency record.

Held: The Court holds the Board failed to articulate the basis upon which it decided to impose the challenged conditions on Conoco's and Citgo's subzone grants. The Court remands this action to the Board so that it may fully explain the rationale underlying its decision to condition Conoco's and Citgo's subzone grants.

(Dated June 30, 1994)

Holland & Hart (William F. Demarest, Jr. and *Adelia S. Borrasca)* and *Lisa L. Bagley,* for plaintiff Conoco, Inc.

Charles M. Floren, for plaintiff Citgo Petroleum Corp.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Carla Garcia-Benitez); Robert Heilferty,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendants.

OPINION

CARMAN, *Judge:* Plaintiffs move for judgment upon the agency record pursuant to USCIT R. 56.1 to challenge certain conditions imposed by the United States Foreign-Trade Zones Board (FTZB or Board) upon the grants of foreign-trade subzones to plaintiffs Conoco, Inc. (Conoco) and Citgo Petroleum Corporation (Citgo). Defendants cross-move for judgment upon the agency record. This Court has jurisdiction under 28 U.S.C. § 1581(i)(1), (4) (1988) and, for the reasons which follow, remands the action to the Board for further action consistent with this opinion.

I. BACKGROUND

A. *Procedure:*

Plaintiffs first raised their challenge to the Board's conditions in a suit filed in the United States District Court for the Western District of

Louisiana, Lake Charles Division. The district court dismissed plaintiffs' suit pursuant to Fed. R. Civ. P. 12(b)(1) after concluding it lacked subject matter jurisdiction. *Conoco, Inc. & Lake Charles Harbor & Terminal Dist. v. United States Foreign-Trade Zones Bd.*, No. 89–1717–LC (W.D. La. 1990) (order dismissing plaintiffs' suit).

Thereafter, plaintiffs commenced this action in the United States Court of International Trade (CIT). In the CIT, defendants again sought to dismiss plaintiffs' case for lack of subject matter jurisdiction and on the grounds that the Board decision at issue is not subject to judicial review. *See Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 16 CIT 231, 232, 790 F. Supp. 279, 280 (1992), *rev'd*, 12 Fed. Cir. (T) ____, 18 F.3d 1581 (1994). The CIT granted defendants' motion to dismiss for lack of subject matter jurisdiction and denied plaintiffs' motion for judgment upon the agency record. *Id.* at 244, 790 F. Supp. at 289.

Plaintiffs then appealed the CIT's decision to the United States Court of Appeals for the Federal Circuit (CAFC). The CAFC reversed the CIT's determination, holding "the orders of the FTZB, absent a clear and unequivocal expression of Congressional intent to the contrary, are generally subject to judicial review * * *." *Conoco*, 12 Fed. Cir. (T) at ____, 18 F.3d at 1585. The appellate court also found the terminology contained in 28 U.S.C. § 1581(i)(1) "easily * * * embrace[s] the matters [plaintiffs] raise" and "the kinds of administrative conditions placed on the grant to [plaintiffs] falls [sic] comfortably within the scope of [the] language [of 28 U.S.C. § 1581(i)(4)]." *Id.* at ____, 18 F.3d at 1588; *see also Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, No. 92–5380, 1994 U.S. App. LEXIS 7415, at *7–10 (D.C. Cir. Apr. 15, 1994) (noting the CIT has exclusive jurisdiction to hear a challenge to the grant of a zone application by the Board on the basis of the CAFC's *Conoco* decision, but also indicating 28 U.S.C. § 1581(i)(2) provides a jurisdictional basis for the CIT). Because the CIT never addressed plaintiffs' substantive claims, the CAFC remanded the action for an adjudication on the merits. *Id.* at ____, 18 F.3d at 1590.

B. *Facts:*

The Lake Charles Harbor and Terminal District (District) operates a foreign trade zone in Lake Charles, Louisiana pursuant to a grant from the Board under 19 U.S.C. § 81b(a) (1988). As described by the CAFC,

> [a] foreign trade zone is a geographical area located adjacent to or in a port of entry into the United States. *See* 19 U.S.C. § 81b (1988). The grantee of a zone—District here—has the authority to permit others to operate within the zone subject to the approval of the Board. *See* 19 U.S.C. § 81m (1988). A company operating within the zone can import foreign merchandise into the zone and manufacture finished merchandise therefrom. *See* 19 U.S.C. § 81c (1988). It can elect whether to pay duties on the foreign merchandise when it is imported into the zone, or on the finished merchandise when it is imported into U.S. customs territory for domestic consumption. The company can thus take advantage of any favorable differential between the rate of duty for the foreign merchandise and that for

> the finished merchandise. *See Armco Steel Corp. v. Stans*, 431 F.2d 779, 782 (2d Cir. 1970).

Id. at ____ n.2 18 F.3d at 1582 n.2.

Foreign trade zone grantees may also apply to the Board for the establishment of a foreign trade subzone. *See id.* at ____ n.3, 18 F.3d at 1582 n.3 (citing 15 C.F.R. § 400.106 (1991)). "A subzone has all the characteristics of a zone except that it is an area separate from an existing zone." *Id.*, 18 F.3d at 1582 n.3 (citing 15 C.F.R. § 400.304 (1991)). The Board may only authorize the establishment of a subzone if it "finds that existing or authorized zones will not serve adequately the convenience of commerce with respect to the proposed purposes." 15 C.F.R. § 400.304. Pursuant to the foregoing regulations, the District filed subzone applications for plaintiffs Conoco and Citgo in April and December 1986, respectively, for their individual crude oil refineries at the Port of Lake Charles, Calcasieu Parish, Louisiana.

The Board subsequently approved the Conoco application on December 16, 1988 and the Citgo application on June 21, 1989. In granting the subzone applications, however, the Board imposed two conditions which the CAFC characterized as follows:

> (1) that duties be paid on foreign crude oil used as fuel (or refined into products used as fuel) in the refineries; and
>
> (2) that Conoco and Citgo elect "privileged foreign status" for foreign crude oil brought into their respective subzones, i.e., elect to pay duties on the value of that crude oil as opposed to the value of refined products produced therefrom.[1]

Conoco, 12 Fed. Cir. (T) at ____, 18 F.3d at 1583; *see also Resolution and Order Approving the Application of the Lake Charles Harbor and Terminal District for a Subzone at the Conoco, Inc., Refinery in Calcasieu Parish, LA*, 53 Fed. Reg. 52,455 (FTZB 1988) *(Conoco Resolution and Order); Resolution and Order Approving the Application of the Lake Charles Harbor and Terminal District for a Subzone at the Citgo Petroleum Corp. Refinery in Calcasieu Parish, LA*, 54 Fed. Reg. 27,660 (FTZB 1989) *(Citgo Resolution and Order)*. "Imposition of these conditions, which the * * * Board has apparently applied to all new refinery subzone grants after 1985, marked a departure from prior Board practice." *Conoco*, 16 CIT at 233, 790 F. Supp. at 281. "It is [also] the imposition of these conditions on the grant of subzone status that lies at the heart of this case." *Conoco*, 12 Fed. Cir. (T) at ____, 18 F.3d at 1583.

II. Contentions of the Parties

Plaintiffs raise two separate challenges to the Board's conditions. First, plaintiffs contend the Board lacked the authority under the FTZA to impose the conditions. Pls.' Br. at 13–16. Plaintiffs assert the Board based its decision to condition the Conoco's and Citgo's grants on market considerations that are outside the purview of the Board's authority to address. *Id.* at 13–14. In sum, plaintiffs claim the conditions improp-

[1] The FTZB imposed and subsequently revoked a third condition that is immaterial to this action.

erly abrogate the "fuel consumption" benefit and statutory election between "foreign-privileged" and "non-privileged" status for merchandise entered into subzones, both of which plaintiffs suggest are available as a matter of right to zone operators under the FTZA. *Id.* at 10–11, 16–18. Second, plaintiffs maintain the Board failed to provide any reasons for imposing the conditions or for diverging from its earlier policy of allowing subzone operators to consume fuel in their subzone operations. *Id.* at 20–21. In so doing, plaintiffs urge the Board acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (1988). *Id.* at 21.

Defendants claim the Board properly decided to impose the disputed conditions on Conoco's and Citgo's subzone grants. Defendants argue the "wide discretion" that Congress has vested in the Board, the plain language of the FTZA, and the Act's legislative history all demonstrate the Board lawfully imposed the conditions at issue. Defs.' Br. at 19–23. Defendants emphasize the fact that the Act expressly permits the Board to exclude from the zones "any goods or process of treatment that in its judgment is detrimental to the public interest * * *" and claim the term "public interest" is broad enough to encompass the protection of domestic industry—the purpose for which defendants suggest the Board acted. *See id.* at 26–27 (citing 19 U.S.C. § 81(c)). Finally, defendants contend the Board did not act arbitrarily or capriciously and did not abuse its discretion in violation of the APA. *Id.* at 30–31. According to defendants, the record clearly indicates the Board considered a variety of factors and the input of various agencies and departments in reaching its determination. *Id.* at 30. Consequently, defendants urge the Board complied with the APA's requirements.

III. Discussion

A. *Standard of Review:*

The statutory provisions governing the scope and standard of review in actions brought in the CIT appear in 28 U.S.C. § 2640. This section indicates the following:

> **§ 2640 Scope and standard of review.**
>
> **(a)** The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:
>
> **(1)** Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.
>
> **(2)** Civil actions commenced under section 516 of the Tariff Act of 1930.
>
> **(3)** Civil actions commenced to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979.
>
> **(4)** Civil actions commenced under section 777(c)(2) of the Tariff Act of 1930.
>
> **(5)** Civil actions commenced to review any decision of the Secretary of the Treasury under section 641 of the Tariff Act of 1930, with the exception of decisions under section

641(d)(2)(B), which shall be governed by subdivision (d) of this section.

(6) Civil actions commenced under section 1582 of this title.

(b) In any civil action commenced in the Court of International Trade under section 516A of the Tariff Act of 1930, the court shall review the matter as specified in subsection (b) of such section.

(c) In any civil action commenced in the Court of International Trade to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or any final determination of the Secretary of Commerce under section 251 or section 271 of such Act, the court shall review the matter as specified in section 284 of such Act.

(d) In any civil action commenced to review any order or decision of the Customs Service under section 499(b) of the Tariff Act of 1930, the court shall review the action on the basis of the record before the Customs Service at the time of issuing such decision or order.

(e) *In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.*

28 U.S.C. § 2640 (1988), *as amended by* Pub. L. No. 103–182, § 684(a)(4), 28 U.S.C.A. § 2640 (West Supp. 1994) (emphasis added). Because § 2640(a) through (d) do not pertain to determinations made by the Foreign-Trade Zones Board, the Court concludes § 2640(e) mandates the application of 5 U.S.C. § 706 in this case. The Court also notes the parties' agreement that 5 U.S.C. § 706 provides the standard of review applicable in this case. *See* Letter of May 5, 1994 from William F. Demarest, Jr., Counsel for Plaintiffs, to the Court (Demarest Letter); Letter of April 28, 1994 from Mark S. Sochaczewsky, former Counsel for Defendants, to the Court (Sochaczewsky Letter).

Section 706 is among "[t]he APA's comprehensive provisions for judicial review of 'agency actions.'" *Heckler v. Chaney,* 470 U.S. 821, 828 (1985). The section sets forth the following standards which the courts must apply in reviewing such actions:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1988). Plaintiffs claim the Court must apply § 706(2)(C) to their threshold argument that the Board lacked the authority to impose the conditions at issue and § 706(2)(A) to their other challenges which target the Board's decision-making. *See* Demarest Letter. Defendants, however, appear to indicate the Court need only apply the standard contained in § 706(2)(A). *See* Sochaczewsky Letter.

Case law addressing § 706's various standards provides the Court with a clear indication as to what standards of review apply in this case. "In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) (citing 5 U.S.C. § 706(2)(A), (B), (C), (D)). Consistent with this direction, and as plaintiffs correctly maintain, the Court must first "decide whether the [Board] acted within the scope of [its] authority" in order to determine whether the Board's action violated § 706(2)(C). *Id.* at 415 (citing *Schilling v. Rogers*, 363 U.S. 666, 676–77 (1960)). Should the Court decide the Board acted within the scope of its authority, the Court may then consider whether the Board's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of § 706(2)(A). *See id.* at 416. Because plaintiffs do not contend the Board committed any procedural or constitutional violations and this action is not subject to 5 U.S.C. §§ 556, 557 or a trial *de novo*, the Court finds the standards set forth in § 706(2) (B), (D), (E), (F) are immaterial to this action. Consequently, the Court concludes the standards of review it must apply to the Board's decision to impose the conditions on Conoco's and Citgo's subzone grants are those contained in § 706(2)(A), (C).

B. *The Foreign-Trade Zones Board's Decision:*

It is axiomatic that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). In connection with the arbitrary and capricious standard of review under 5 U.S.C. § 706(2)(A), the scope of review "is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory

explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "While [the courts] may not supply a reasoned basis for the agency's action that the agency itself has not given, * * * [the courts must] uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974) (citations omitted).

Although the Supreme Court articulated the foregoing analysis in relation to administrative determinations reviewed under § 706(2)(A), the principles applied in the analysis are relevant whenever the courts are called upon to review administrative action. *See, e.g., Chenery Corp.*, 332 U.S. at 207 ("The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action."). In the instant case, therefore, in reviewing the Board's action under 5 U.S.C. § 706(2)(C) for conformity to its statutory authority, the Court must examine the basis for the Board's action and determine whether it is within the scope of the Board's authority. Therefore, as suggested previously,

> [i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

Id. at 196–97.

In this case, the Court finds the Board's decision to impose the disputed conditions on Conoco's and Citgo's subzone grants does not contain an understandable basis that would permit the Court to determine whether the Board acted within the scope of its authority. The notices that the Board published to announce its decisions to approve the two companies' subzone applications with the two conditions simply do not indicate on what basis the Board imposed the conditions. *See Conoco Resolution and Order*, 53 Fed. Reg. at 52,455–56; *Citgo Resolution and Order*, 54 Fed. Reg. at 27,660–61. While the notices indicate the proposed subzones would satisfy the FTZA's requirements, the Board's regulations, and "would be in the public interest, if approval is subject to certain conditions,"[2] the notices do not explain why the Board imposed the conditions, how the conditions serve the public interest, or how the conditions conform the proposed subzones to the FTZA's requirements and the Board's regulations.

Moreover, during oral argument in the case after remand from the CAFC, defendants' counsel was unable to point to anything in the record which indicates upon what grounds *the Board* decided to impose the dis-

[2] *Conoco Resolution and Order*, 53 Fed. Reg. at 52,455; *Citgo Resolution and Order*, 54 Fed. Reg. at 27,660.

puted conditions. Instead, counsel cited to transmittal letters from the FTZB's Executive Secretary, John J. Da Ponte, to the Assistant Secretary of the Treasury, the Commissioner of Customs, and the Department of the Army's Acting Resident Member of the Board of Engineers for Rivers and Harbors. *See* Conoco Pub. R. Docs. 58–60, Frs. 552–54; Citgo Pub. R. Docs. 29–31, Frs. 307–09. These letters accompanied proposed draft resolutions approving Conoco's and Citgo's subzone applications with the contested conditions attached. Each of the letters, except for those addressed to the Assistant Secretary of the Treasury, noted "[t]he restricted approval we are proposing here is similar to that given in the recent TransAmerica case." Conoco Pub. R. Docs. 58–59, Frs. 552–53; Citgo Pub. R. Docs. 30–31, Frs. 308–09. The transmittal letters provided no further explanation for proposing the imposition of the disputed conditions.

Although several record documents help clarify the connection between the TransAmerica case and Conoco's and Citgo's subzone applications and the possible bases for imposing the conditions,[3] the Board's own decisions to grant the companies' applications with the conditions provide no such clarification. This lack of clarity in the Board's decisions prevents the Court from discerning the path the Board followed in conditioning the companies' subzone grants and improperly requires the Court to "supply a reasoned basis for the [Board's] action that the [Board] itself has not given * * *." *Bowman Transp.*, 419 U.S. at 285–86. While the Court may surmise upon what grounds the Board decided to impose the conditions, the Board and not the Court bears the burden of "articulat[ing] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (quotation and citation omitted). Because the Board has failed to set forth adequately the basis for imposing the conditions on Conoco's and Citgo's subzone grants, the Court finds it is unable to ascertain pursuant to 5 U.S.C. § 706(2)(C) whether the Board acted in conformity with its statutory authority. The Court also finds the deficiencies in the Board's explanation of its action precludes the Court from determining whether the Board's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2) (A). The Court, therefore, will remand this action to the Board so that it may fully explain the rationale underlying the decisions at issue.

IV. Conclusion

The Court holds the Board failed to articulate the basis upon which it decided to impose the challenged conditions on Conoco's and Citgo's subzone grants. The Court remands this action to the Board so that it

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[3] *See* Office of Energy's Mem. on Subzone Applics., Conoco Pub. R. at Frs. 534–41, App. E to Citgo Pub. R. Doc. 28, Frs. 289–96; Examiners Comm. Report on Conoco's Applic., Conoco Pub. R. Doc. 57, Frs. 519–28; Examiners Comm. Report on Citgo's Applic., Citgo Pub. R. Docs. 28, Frs. 275–83; TransAmerican Decision Mem. Conoco Pub. R. at Frs. at 542–47, App. F. to Citgo Pub. R. Doc. 28, Frs. 297–302; Conoco Decision Mem., Conoco Pub. R. Doc. 63, Frs. 559–62; Citgo Decision Mem., Citgo R. Pub. Docs. 38–39, Frs. 322–26.

may fully explain the rationale underlying its decision to condition Conoco's and Citgo's subzone grants.

On remand, in addition to whatever matters the Board deems appropriate to address, the Board shall explain whether and in what manner the conditions it has imposed on Conoco's and Citgo's subzone grants serve the public interest. The Board's Remand Results must be filed with this Court no later than Friday, July 29, 1994. Plaintiffs and defendants may each file a single response to the Board's Remand Results of no more than ten pages no later than Friday, August 5, 1994. Plaintiffs may file a reply of no more than five pages no later than Friday, August 12, 1994. No extensions of time and no further briefing shall be allowed.

(Slip Op. 94–106)

GOODMAN MANUFACTURING, L.P., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–01–00029

Plaintiff challenges Customs' denial of its protest against the valuation of privileged merchandise transferred from Goodman's foreign trade subzone into U.S. customs territory. The Court holds plaintiff has not overcome the presumption of correctness attached to Customs' valuation of the merchandise. Defendant's cross-motion for summary judgment is granted and plaintiffs motion is denied in all respects.

(Dated June 30, 1994)

Strasburger & Price, L.L.P. (William M. Methenitis and *Andrew G. Halpern),* for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Carla Garcia-Benitez); Karen P. Binder,* Office of the Assistant Chief Counsel, United States Customs Service, of Counsel, for defendant.

Collier, Shannon, Rill & Scott (Lauren R. Howard and *Mary T. Staley),* for amicus curiae American Iron and Steel Institute.

OPINION

CARMAN, *Judge:* Plaintiff commenced this action pursuant to 19 U.S.C. § 1515(a) (1988) to contest the denial of its protest against the United States Custom Service's (Customs) appraisement of steel that plaintiff had imported from Korea into its Houston, Texas plant. Goodman's Houston plant is designated as Foreign Trade Subzone (FTZ) number 84G. The Court has jurisdiction under 28 U.S.C. § 1581(a) (1988) and, for the reasons which follow, enters judgment for defendant.

BACKGROUND

The merchandise at issue consists of three coils of cold rolled steel sheets, subject to a duty rate of 5.1%, for which plaintiff paid $25.70 per

100 pounds. Stipulation of Facts in Lieu of Trial (Stip. Facts) at 1. In total, plaintiff paid $4,848.24 for 28,109 pounds of steel, exclusive of international shipment and insurance costs. *Id.* Goodman entered the steel on May 12, 1992 to its FTZ number 84G in Houston as privileged foreign merchandise. *Id.* at 2. Plaintiff subsequently used all 28,109 pounds of steel in its production of central heating furnaces. From the 28,109 pounds of steel used in this production, 2,652 pounds resulted in steel scrap which was ultimately "properly entered and appraised based on transaction value at $81.68 upon its transfer from the subzone and entry into domestic commerce." *Id.*

Goodman entered the central heating furnaces it produced in the subzone at the Port of Houston, Texas on May 15, 1992 (Entry No. 601-0010100-9). Customs classified the privileged foreign steel incorporated into the finished furnaces under HTSUS 7209.23.0000 and assessed a duty rate of 5.1% *ad valorem*. *Id.* at 2–3. Goodman valued and entered this steel on the basis of transaction value which amounted to $4,767.00. Customs calculated the value of the steel by subtracting international freight and insurance ($2,151.66) and the sales price received from the scrap dealer who purchased the 2,652 pounds of steel scrap ($81.68) from the full price paid for all 28,109 pounds of steel admitted to the FTZ ($6,999.90). *Id.* at 3. Goodman paid duties of $243.12. *Id.*

Plaintiff filed a timely protest under 19 U.S.C. § 1514(a) (1988) to challenge Customs' valuation of the steel. On December 11, 1992, Customs denied the protest under 19 U.S.C. § 1515 and, after having paid all liquidated duties, plaintiff commenced this action pursuant to 28 U.S.C. § 1581(a). *Id.* at 4.

CONTENTIONS OF THE PARTIES

Goodman argues the plain language of the Foreign Trade Zones Act (FTZA) and its legislative history supports plaintiff's position that "the proper method for valuation of the foreign privileged steel * * * is transaction value, based on the actual price per pound paid for the steel multiplied by the amount of steel (by weight) actually entered into domestic commerce as part of a finished furnace." Plaintiff's Complaint at 2–3. In other words, plaintiff maintains it must only pay duty on the physical amount or *quantity* of steel that actually enters the U.S. According to plaintiff, the Court must not decide whether Customs has reasonably interpreted the statute, but rather must determine the correct interpretation of the statute. Moreover, because Goodman contends Customs' interpretation of the statutory waste provision is unreasonable, plaintiff argues the Court should not defer to Customs.

Defendant maintains it properly interpreted the FTZA when developing its valuation methodology. Customs' methodology is based on subtracting the *value* of the waste produced from the *value* of the privileged foreign merchandise used in the manufacturing process. The appropriate duty rate is then applied to this resultant value. According to Customs, 19 U.S.C. § 81c (1988) and its legislative history direct Customs to

make an allowance for recoverable and irrecoverable waste, but do not state how Customs should calculate that allowance. Because Congress did not provide Customs specific guidance in making the calculation, Customs contends it was necessary for it to develop a method consistent with the statute. Customs maintains its interpretation of § 81c is reasonable and consistent with its past practice, and that the Court should, therefore, defer to Customs' interpretation.

Amicus recognizes the statute, legislative history and relevant regulations indicate Customs must make an allowance for recoverable waste when calculating the dutiable value of merchandise entering U.S. customs territory. *Amicus,* however, claims Congress gave Customs the discretion to establish a method for determining the duty to be paid and for calculating the amount of allowance for the waste. Because *Amicus* argues Customs' methodology is consistent with the statute, regulations, purpose of the FTZA and Customs' longstanding practice, it requests the Court uphold Customs' interpretation of the law. According to *amicus,* to hold otherwise would allow plaintiff to misuse the FTZA and cause injury to domestic manufacturers.

Standard of Review

As in all "[c]ivil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930," the Court reviews the record in this case *de novo. See* 28 U.S.C. § 2639(a)(1) (1988). Customs' appraisement decisions carry a presumption of correctness and "[t]he burden of proving otherwise * * * rest[s] upon the party challenging such decision." *Id.; see Moss Mfg. Co. v. United States,* 13 CIT 420, 424, 714 F. Supp. 1223,1227 (1989), *aff'd,* 8 Fed. Cir. (T) 40, 896 F.2d 535 (1990).

Discussion

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d). "The Court will deny summary judgment if the parties present a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States,* 17 CIT ___, ___, 813 F. Supp. 848, 852 (1993) (quotation and citation omitted). This case does not present any genuine issue of material fact. The issue that remains only involves the proper construction of 19 U.S.C. § 81c(a). Because this issue pertains solely to matters of statutory interpretation, the Court concludes the parties' conflict raises a question of law which the Court may properly resolve by summary judgment.

The question of law before the Court is how the allowance for waste provision in § 31c should be applied in determining the appropriate dutiable value of privileged foreign merchandise entering U.S. customs territory as part of a finished product. Contrary to defendant's asser-

tions, the issue before the Court is *not* whether Customs reasonably interpreted the statute. Although Customs' decisions enjoy a presumption of correctness,[1] the Court's role in reviewing Customs cases *de novo* is to find the *correct* result. *See Semperit Indus. Prods., Inc. v. United States,* 18 CIT ____, ____, Slip Op. 94–100 at 15–18 (June 14, 1994). The Court determines the correct result in valuation cases, as it does in customs classification cases, in order to achieve fair results and provide "uniform and consistent interpretation and application of the customs laws[.]" *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 73, 733 F.2d 873, 876, *reh'g denied,* 2 Fed. Cir. (T) 97, 739 F.2d 628 (Fed. Cir. 1984) (quotations and citation omitted). However, because plaintiff has failed to overcome the presumption of correctness, the Court finds for defendant.

Congress authorized the Foreign-Trade Zones Board "to grant to public and private corporations the privilege of establishing, operating, and maintaining [FTZs] for the purpose of expediting and encouraging foreign commerce." S. Rep. No. 1107, 81st Cong., 2d Sess. ____ (1949), *reprinted in* 1950 U.S.C.C.S. 2533, 2533–34; *see also* 19 U.S.C. § 81b(a) (1988). A FTZ "is an isolated, fenced off, and policed area within or adjacent to a port of entry." S. Rep. No. 1107 at 2533, *reprinted in* 1950 U.S.C.C.S. at 2533. A FTZ allows foreign merchandise to "be landed, stored, repacked, sorted, mixed or otherwise manipulated with a minimum of customs control and without customs bond." *Id.* Any such merchandise brought into customs territory, however, "is subject to all customs laws and regulations." *Id.* A subzone such as plaintiff's, "has all the characteristics of a zone except that it is an area separate from an existing zone" and "can only be created when a company cannot be accommodated within the zone." *Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.,* 12 Fed. Cir. (T), ____, ____, 18 F.3d 1581, 1582 n.3 (citation omitted).

The treatment and appraisal of foreign merchandise entered into U.S. customs territory from a FTZ is provided for in § 81c. This statute, in relevant part, reads as follows:

> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into customs territory of the United States therefrom, in the original package or otherwise; but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the Unites States affecting imported merchandise: *Provided,* That whenever the privilege shall be requested and

[1] 28 U.S.C. § 2639(a)(1).

> there has been no manipulation or manufacture effecting a change in tariff classification, the appropriate customs officer shall take under supervision any lot or part of a lot of foreign merchandise in a zone, cause it to be appraised and taxes determined and duties liquidated thereon. Merchandise so taken under supervision may be stored, manipulated, or manufactured under the supervision and regulations prescribed by the Secretary of the Treasury, and whether mixed or manufactured with domestic merchandise or not may, under regulations prescribed by the Secretary of the Treasury, be exported or destroyed, or may be sent into customs territory upon the payment of such liquidated duties and determined taxes thereon. If merchandise so taken under supervision has been manipulated or manufactured, such duties and taxes shall be payable on the quantity of such foreign merchandise used in the manipulation or manufacture of the entered article. Allowance shall be made for recoverable and irrecoverable waste; and if recoverable waste is sent into customs territory, it shall be dutiable and taxable in its condition and quantity and at its weight at the time of entry * * *.

19 U.S.C. § 81c(a).

Pursuant to § 81c and Customs' regulations, the Department appraises articles transferred from a FTZ to U.S. customs territory which contain privileged foreign merchandise. *See* 19 C.F.R. § 146.65(a)(1) (1992). Customs' regulations provide that dutiable value of such privileged merchandise shall be based on the price actually paid for the merchandise in the transaction that caused the merchandise to be admitted into the FTZ, less international shipment and insurance costs and U.S. inland freight costs. *Id.* §§ 146.65(b)(2), 152.103(a). In calculating the dutiable value of the merchandise, § 81c requires Customs to make a deduction for the recoverable waste generated as a result of the processing in the FTZ. *See also id.* § 146.65(b)(2). Customs classifies and appraises the recovered waste based on its character and condition at the time of entry into the customs territory. *See* 19 U.S.C. § 81c(a); 19 C.F.R. § 146.42(b) (1992). Plaintiff does not dispute Customs' treatment of the waste and stipulates Customs "properly entered and appraised [this non-privileged foreign merchandise] based on transaction value at $81.68 upon its transfer from the subzone and entry into domestic commerce." Stip. Facts at 2. Additionally, because none of the limitations listed in 19 C.F.R. 152.103(j) is present, plaintiff does not dispute transaction value is the proper valuation method for the foreign privileged steel contained in the finished furnaces. *Id.* at 3.

Goodman maintains the plain language of § 81c supports its argument. Specifically, plaintiff points to the following two sentences:

> If merchandise so taken under supervision has been manipulated or manufactured, such duties and taxes shall be payable on *the quantity of such foreign merchandise* used in the manipulation or manufacture of the entered article. *Allowance shall be made for recoverable and irrecoverable waste;* and if recoverable waste is sent

> into customs territory, it shall be dutiable and taxable in its condition and quantity and at its weight at the time of entry.

19 U.S.C. § 81c(a) (emphasis added). The first clause of the second sentence requires Customs to make an allowance for recoverable and irrecoverable waste. Goodman contends this allowance must be made to "the *quantity* of such foreign merchandise used in the manipulation or manufacture of the entered article." *Id.* (emphasis added). According to plaintiff, the fact the first phrase of the second sentence relates back to the first sentence mandates an adjustment to quantity. Based on Goodman's reading of the statute, therefore, Customs should have reduced the amount of the dutiable steel by the number of pounds of steel waste. Goodman's valuation method results in an appraised value of $4,390.82 and duty of $223.93. Goodman's suggested calculation provides the following:

Transaction value of 28,109 pounds of privileged foreign steel (28,109 lbs. × $.17248 per lb.) ...	$4,848.24
Less: value of 2,652 pounds or privileged steel generated as steel wast or scrap (2,652 lbs. × $.17248 per lb.)	457.42
	$4,390.82
Multiply by duty rate (5.1%)	× .051
Duty paid for steel used in furnaces brought into U.S. customs territory	$ 223.92

Customs argues neither § 81c nor its legislative history provides the Court with guidance in resolving the issue in this case. According to Customs, § 81c and its legislative history merely indicate an allowance should be made for recoverable waste, but do not establish how Customs must calculate such an allowance. Similarly, Customs maintains § 81c does not instruct it how the waste allowance should affect the amount of duties payable when manufactured goods containing privileged foreign merchandise are transferred from a FTZ to customs territory. Because Customs received no guidance from Congress, Customs claims it attempted to construe the statute strictly.

Customs based its calculation on the transaction value of the quantity of steel used in the manufacturing process pursuant to the language of § 81c(a). This provision indicates, "[i]f merchandise so taken under supervision has been manipulated or manufactured, such duties and taxes shall be payable on the quantity of such foreign merchandise *used in the manipulation or manufacture of the entered article.*" 19 U.S.C. § 81c(a) (emphasis added). Because Goodman used all of the 28,109 pounds of steel in the manufacture of the furnace cabinets, Commerce based it calculation on the value of that amount of steel. *See* FTZ Activity Schedule, Exhibit C to Plaintiff's Motion for Summary Judgment *("All* Lot #001 steel was used to produce 21 inch furnace cabinets * * *. The 21 inch furnace cabinets were all used in the manufacture of 874 finished central heating furnace units * * *. 2,652 pounds of scrap steel

* * * was generated during the manufacturing processes * * *.") (emphasis added). Customs' calculation method is as follows:

Transaction value of privileged foreign steel ...	$4,848.24
Less: value of the steel wast or scrap	81.68
	$4,766.56
Multiply by duty rate (5.1%)	× .051
Duty paid for steel used in furnaces brought into U.S. customs territory	$ 243.10

Customs' valuation method produces an appraised value of $ 4,848.24 and duty of $ 243.10.

Contrary to plaintiffs assertions, the Court does not find § 81c to be clear and unambiguous. Moreover, the Court finds plaintiffs interpretation of § 81c meritless. As indicated above, this statute provides for the following in relevant part:

> If merchandise so taken under supervision has been manipulated or manufactured, such duties and taxes shall be payable on *the quantity of such foreign merchandise* used in the manipulation or manufacture of the entered article. *Allowance shall be made for recoverable and irrecoverable waste;* and if recoverable waste is sent into customs territory, it shall be dutiable and taxable in its condition and quantity and at its weight at the time of entry.

19 U.S.C. § 81c(a) (emphasis added). While this language instructs Customs to base its *initial valuation* on quantity, Congress did not instruct Customs to base the required *adjustment for waste* on quantity. Although Goodman maintains the phrase "quantity of such foreign merchandise" requires Customs to reduce the quantity of steel used in the manufacturing process by the quantity of steel resulting in waste, the Court fails to see the connection between this phrase and the subsequent sentence. In short, this Court holds plaintiff has failed to overcome the presumption of correctness that attaches to the valuation methodology adopted by Customs.

Furthermore, plaintiff's suggested methodology would also create problems in those instances where the measure of quantity of merchandise changes as a result of physical or chemical changes in the manufacturing process in the FTZ. If Customs were to use plaintiffs valuation methodology in such a situation, the dutiable value of the merchandise entering U.S. customs territory could not properly be calculated based on quantity. Customs' method on the other hand, bases its calculation on the transaction value of the amount used in the manufacturing process. This method avoids the potential problem of measuring quantity after physical or chemical changes have taken place. Plaintiff has not only failed to overcome the statutory presumption of correctness accorded Customs' decision, it has presented the Court a valuation methodology which could generate future application difficulties.

CONCLUSION

After considering all of plaintiff's, defendant's and *amicus curiae's* arguments, the Court finds plaintiff has failed to overcome the presumption of correctness attached to Customs' valuation. Accordingly, the Court denies plaintiff's motion in all respects. Defendant's cross-motion for summary judgment is granted.

(Slip Op. 94–107)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Court No. 92–01–00031

Plaintiff, The Timken Company, moves this Court for judgment on the agency record pursuant to Rule 56.1 of the Rules of this Court. plaintiff requests this Court remand this case to the Department of Commerce, international Trade Administration ("Commerce") in order that Commerce perform the following: (1) recalculate foreign market value to include the full amount of Japanese consumption tax actually incurred; (2) recompute foreign market value and exporter's sales price for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. so that commissions alleged in the home market are either (a) treated as indirect selling expenses, or (b) subject to the commission offset pursuant to 19 C.F.R. § 353.56(b) (1); (3) recalculate the home market inland freight costs to disregard pre-sale movement expenses incurred during transport of merchandise from factory to warehouse; (4) recalculate the exporter's sales price for NSK Ltd. and NSK Corporation so that credit costs borne by NSK Ltd. on behalf of its U.S. subsidiary are imputed to NSK Corporation on the basis of U.S. short-term interest rates; (5) assess interest on underpayment of antidumping duties; and (6) establish estimated duty deposit and assessment instructions with respect to tapered roller bearings admitted into foreign trade zones during the period of review.

Held: plaintiff's motion is granted in part and this case is remanded to Commerce for (1) addition to United States price of the full amount of the home market consumption tax waived or forgiven without a circumstance of sale adjustment to foreign market value; (2) reconsideration of its treatment of commissions while limiting circumstance of sale adjustments to those commissions which bear a direct relationship to the sales compared; and (3) denial of the adjustment to foreign market value for home market pre-sale freight expenses where foreign market value was calculated using purchase price. Commerce's determination is affirmed in all other respects.

[Plaintiff's motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated July 1, 1994)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen, Margaret E.O. Edozien, Amy S. Dwyer and *Olufemi A. Areola)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis);* of counsel: *Joan L. MacKenzie,* Attorney-Adviser, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Susan P. Strommer, Niall P. Meagher, Robert A. Calaff and *Susan M. Mathews),* for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Donohue and Donohue (Joseph F. Donohue, Jr., Kathleen C. Inguaggiato and *Daniel W. Dowe)* for defendant-intervenors NSK Ltd. and NSK Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Timken Company ("Timken"), commenced this action to challenge certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of the administrative review of certain tapered roller bearings ("TRBs") from Japan. *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review ("Final Results"),* 56 Fed. Reg. 65,228 (Dec. 16, 1991).

BACKGROUND

In 1976, the Treasury published a dumping finding, designated as T.D. 76–227, with respect to TRBs from Japan. *Tapered Roller Bearings and Certain Components From Japan,* 41 Fed. Reg. 34,974 (Aug. 18, 1976). In 1981, Commerce clarified T.D. 76–227 to cover only TRBs four inches or less in outside diameter, and certain TRB components. *Tapered Roller Bearings and Certain Components Thereof From Japan; Clarification of Scope of Antidumping Finding,* 46 Fed. Reg. 40,550 (Aug. 10, 1981).

In April 1991, Commerce published the preliminary results of its administrative review of TRBs covering the period August 1, 1988 through July 31, 1989. *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 14,924 (April 12, 1991).

In December 1991, Commerce published the final results of its administrative review of TRBs covering the period August 1, 1988 through July 31, 1989. *Final Results,* 56 Fed. Reg. 65,228.

Timken moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record alleging that the following actions by Commerce were unsupported by substantial evidence on the administrative record and not in accordance with law: (1) use of a methodology for adjusting United States price ("USP") and foreign market value ("FMV") for Japan's consumption tax that granted a circumstance of sale ("COS") adjustment to FMV to achieve tax neutrality; (2) treatment of commissions alleged in the home market; (3) adjustment of FMV for pre-sale inland freight; (4) use of home market short-term borrowing rate in calculating inventory carrying cost; (5) failure to assess interest on underpayment of antidumping duties; and (6) treatment of antifriction bearings imported into foreign trade zones ("FTZ"). *Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record ("Timken's Memorandum")* at 12–55.

DISCUSSION

The Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *COS Adjustment to FMV for Consumption Tax:*

Pursuant to 19 U.S.C. § 1677a(d)(1)(c) (1984), Commerce added an amount to USP for the Japanese consumption tax levied on goods and services consumed domestically, but not collected on exports from Japan. Commerce then made a COS adjustment to FMV to offset any difference in home market and U.S. tax under 19 U.S.C. § 1677b(a)(4) (1988). *Final Results,* 56 Fed. Reg. at 65,229.

Timken challenges Commerce's use of this methodology which grants a COS adjustment to FMV to achieve a tax neutral dumping margin. *Timken's Memorandum* at 12–15.

Defendant argues that its actions were supported by substantial evidence on the administrative record and otherwise in accordance with law. *Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Defendant's Memorandum")* at 5–21.

For a more detailed discussion of defendant's arguments on this issue, see this Court's decision in *Torrington Co. v. United States,* 17 CIT ____, ____, 818 F. Supp. 1563, 1567–69 (1993).

This Court has fully addressed these arguments and adheres to its decision on this issue in *Federal-Mogul Corp. v. United States,* 17 CIT ____, ____, 813 F. Supp. 856, 863–65 (1993), wherein the Court held that, because tax neutrality is not a goal of 19 U.S.C. § 1677b(a)(4)(B) and because the difference in tax amounts in FMV and USP is not a difference in COS eligible for adjustment under that provision, FMV should not be adjusted for the alleged distortion to dumping margins from an addition to USP pursuant to 19 U.S.C. § 1677a(d)(1)(c). In oral argument, defendant acknowledged that the Appellate Court has sustained this Court's position on this issue and states that upon remand "Commerce will proceed to comply with the decisions." *Transcript of Oral Argument* at 18 (April 22, 1993). This Court remands this issue to Commerce to allow Commerce to add to USP the full amount of home market consumption tax waived or forgiven without a COS adjustment to FMV.

2. *Treatment of Koyo's Commissions:*

In the final results, Commerce agreed with Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") that home market commissions

should not be included in home market indirect selling expenses, but should be treated as direct COS adjustments under 19 C.F.R. § 353.56(b) (1991). *Final Results,* 56 Fed. Reg. at 65,235.

Timken alleges that Koyo did not demonstrate that home market commissions were directly related to sales of the subject merchandise and as such, the ITA should have treated those expenses as indirect selling expenses, allowing an adjustment to foreign market value only under 19 C.F.R. § 353.56(b)(2) (1991). Timken also claims that, even assuming Commerce correctly deducted commissions from Koyo's home market prices, Commerce improperly failed to apply the "commission offset" so that indirect selling expenses incurred in the U.S. would be deducted from exporter's sales price ("ESP") pursuant to 19 C.F.R. § 353.56(b)(1). Timken, therefore, alleges that Commerce's application of 19 C.F.R. § 353.56 in this case is contrary to the agency's prior practice and is based on an erroneous interpretation of its regulation. *Timken's Memorandum* at 15–22.

Koyo maintains its home market commissions were directly related to the subject sales and Commerce has verified Koyo's method of granting the commissions, declaring that the method reasonably relates the commission expense to subject sales. Koyo argues that it is unnecessary for Commerce to apply 19 C.F.R. § 353.56(b) at all, as it applies only where commissions are paid in one market "and no commission is paid in the other market under 19 C.F.R. § 353.56(b)(1). Koyo paid sales commissions in both the U.S. and home markets—although commissions were not paid on every single sale. Consequently, Commerce applied this regulation where the particular sales it was comparing did not each have a commission expense. Koyo further asserts that although Commerce was not required to apply this regulation, the manner in which the regulation was applied was reasonable. Koyo states that in the absence of explicit statutory guidance (as here), Commerce's interpretation of the statute should be given deference. *Defendant-Intervenor Koyo's Memorandum in Opposition to Plaintiff Timken's Motion for Judgment on the Agency Record ("Koyo's Memorandum")* at 19–24.

Defendant agrees with Koyo's position that, when reviewing ESP sales, Commerce should treat them as directly related expenses for which COS adjustments are appropriate. Because the administrative record does not contain a sufficient explanation of Commerce's action, Commerce requests that the case be remanded to Commerce for reconsideration of its treatment of Koyo's commissions. *Defendant's Memorandum* at 21–23.

Section 353.56 provides for allowances in calculating foreign market value for bona fide differences in circumstances of sale. 19 C.F.R. § 353.56(a)(1). It limits allowances to "those circumstances which bear a direct relationship to the sales compared." *Id.* The regulation provides that the "[d]ifferences in circumstances of sale for which the Secretary will make reasonable allowances normally are those involving differ-

ences in commissions, credit terms * * *." 19 C.F.R. § 353.56(a)(2). 19 C.F.R. § 353.56(b) states:

> (b) *Special Rule.* (1) Notwithstanding paragraph (a), the Secretary normally will make a reasonable allowance for other selling expenses if the Secretary makes a reasonable allowance for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, but the Secretary will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.
>
> (2) In comparisons with exporter's sales price, the Secretary will make a reasonable deduction from foreign market value for all expenses, other than those described in paragraph (a)(1) or (a)(2), incurred in selling such or similar merchandise up to the amount of the expenses, other that [sic] those described in paragraph (a)(1) or (a)(2), incurred in selling the merchandise.

In the preliminary results, Commerce treated the commissions reported by Koyo as indirect selling expenses. However, in the final results, Commerce changed its calculation to provide for a separate calculation of the circumstance of sale adjustment for commissions and the ESP offset. *Final Results,* 56 Fed. Reg. at 65,235.

Commerce has requested that this issue be remanded for reconsideration of its treatment of Koyo's commission. As the administrative record does not contain a comprehensive explanation of the ITA's action, this matter is remanded to Commerce for reconsideration of its treatment of Koyo's commission. Commerce should limit COS adjustments to those expenses which bear a direct relationship to the sales compared as set forth in 19 C.F.R. § 353.56(a)(1).

3. *Pre-sale Inland Freight Adjustment to FMV:*

The ITA adjusted FMV for home market pre-sale movement expenses incurred during the transport of merchandise from the factory to the warehouse or distribution center. *Final Results,* 56 Fed. Reg. at 65,233–34.

During the administrative review, Timken asserted that NSK Ltd. and NSK Corporation ("NSK") and Koyo reported their home market inland freight adjustment inaccurately and that Commerce should either recalculate or disallow this adjustment as a direct expense. *Final Results,* 56 Fed. Reg. at 65,233.

Timken further claimed that Koyo's adjustment is inaccurate because it commingles pre-sale freight expenses incurred to move the product to warehouses or distribution centers with those incurred post-sale to ship the merchandise to its customers. *Id.*

Timken asserted during the administrative review that because NSK approximated freight expenses attributable to pre-sale transportation and because NSK could not directly isolate post-sale freight expenses in its accounting records, Commerce should decline to make any adjustment for pre-sale freight expenses and should treat the remainder of NSK's freight expense as an indirect selling expense. *Id.*

Timken now argues that treating home market pre-sale inland freight expenses as direct selling expenses is contrary to law. For support, Timken relies on 19 U.S.C. § 1677b(a)(4) (1980) and its legislative history which suggest that adjustments to FMV should be limited to selling expenses directly related to the sales under consideration. Timken argues that, as pre-sale freight expenses may not relate to a home market transaction, they should not be deducted as direct selling expenses. *Timken's Memorandum* at 23–29.

Commerce acknowledges that 19 U.S.C. § 1677a(d)(2)(A) requires that the ITA reduce USP by any expenses "incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States." 19 U.S.C. § 1677a(d)(2)(A). Commerce regulations, contained in 19 C.F.R. § 353.41(d)(2)(i) (1991), similarly provide for an adjustment to USP for all movement expenses incurred on United States sales, regardless of when they are incurred. Thus, Commerce argues, the current antidumping duty law requires Commerce to deduct all movement expenses incurred, even those incurred prior to sale, on United States sales in order to establish the ex-factory price for sales comparison purposes. *Defendant's Memorandum* at 25–26. Pursuant to these provisions, the ITA must deduct all inland freight expenses incurred on U.S. sales in order to establish the ex-factory price for comparison to FMV. *Id.* However, no corresponding provision exists with regard to inland freight expenses incurred in the home market. *Defendant's Memorandum* at 23–28.

Commerce argues that by denying an adjustment for pre-sale inland freight expenses to FMV, Commerce essentially would compare an ex-factory price in the United States to an ex-warehouse price in the home market. By deducting pre-sale inland freight expenses from FMV in the home market, Commerce is able to compare U.S. exfactory prices with their counterpart in the home market. *Id.*

Koyo and NSK agree with Commerce and urge this Court to affirm Commerce on this issue. *Koyo's Memorandum* at 23–26; *Response of NSK Ltd. and NSK Corporation in Opposition to Motion of The Timken Company for Judgment Upon the Agency Record ("NSK's Memorandum"),* at 10–14.

It is well-established that where Congress has included specific language in one section of a statute but has omitted it from another related section of the same act, it is generally presumed that Congress intended the omission. *Russello v. United States,* 464 U.S. 16, 23 (1983).

The Court of Appeals for the Federal Circuit, in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 13 F.3d 398, 401–02 (Fed. Cir. 1994) stated:

> * * * we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. FMV and USP are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. *See* 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with refer-

> ence to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a, and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.

The *Ad Hoc Comm.* court, however, limited its decision to the calculation of FMV in purchase price situations only. *Id.* at 400. As it is not clear to this Court whether FMV was calculated in this case using purchase price or ESP, this Court remands this issue to the ITA to deny the adjustment to FMV for Koyo's and NSK's pre-sale home market transportation expenses only if FMV was calculated using purchase price.

4. *Inventory Carrying Cost:*

In the preliminary results, the ITA calculated inventory carrying cost based on U.S. interest rates, but in the final results, the ITA recalculated the U.S. inventory carrying cost of NSK's U.S. subsidiary, NSK Corporation ("NSKC"), using NSK's short-term interest rate in Japan. *Final Results,* 56 Fed. Reg. at 65,236.

In the preliminary results, NSK had objected to Commerce's use of the U.S. short-term credit rate in the calculation of inventory carrying cost. Because NSKC had six months to pay for the imported merchandise, NSK argued that, as the parent company, it incurred the cost of keeping the goods in inventory for the subsidiary. NSK contended that because the time value of its funds was being measured, and because NSK would borrow at the lower rate in Japan according to reasonable commercial practice, Commerce should use the home market interest rate to impute the U.S. inventory carrying cost. Commerce agreed with NSK's position, stating:

> Normally, the Department calculates U.S. inventory carrying cost using the U.S. interest rate because the U.S. subsidiary bears the full cost of carrying the merchandise. However, as per *High Information Content Flat Panel Displays and Display Glass Thereof from Japan* (July 16, 1991, 56 FR 32399), if the payment terms that the parent extends to its subsidiary, in combination with the time the merchandise remains in the subsidiary's inventory, indicates that the parent bears the cost of carrying the merchandise for a portion of time the merchandise is in inventory, then the parent's short-term interest rate will be used to calculate that portion of the inventory carrying cost. Accordingly, we have recalculated NSKC's U.S. inventory carrying cost using NSK's short-term interest rate for the time that NSK bears the cost of carrying the inventory.

Final Results, 56 Fed. Reg. at 65,236.

Timken claims that Commerce has not "articulated any reasoned basis for departing from its well-established precedent" because the published determinations do not reveal, for example, whether the U.S. importers in question had access to foreign currency loans. *Timken's Memorandum* at 32.

Timken maintains that given the facts of this case, the ITA should use the U.S. borrowing rate to measure the cost of storing merchandise in the United States by reference to the opportunity cost faced by the "exporter," NSKC. The ITA's use of the Japanese short-term rate for the portion of time the cost was allegedly borne by NSK is contrary to the purpose of imputing a credit expense, and is contrary to longstanding agency practice. Absent a reasonable basis for departing from that practice which has been affirmed by this Court, Timken argues, the ITA's determination here should be reversed and remanded. *Timken's Memorandum* at 34.

NSK states that all the time its goods were in inventory, NSKC had no "inventory carrying cost" because it had not paid for the goods. On the other hand, NSK, the parent company, bore the cost of maintaining the inventory in the United States. The ITA, therefore, properly calculated the cost using the credit rate in Japan. *NSK's Memorandum* at 15–17.

Pursuant to 19 U.S.C. § 1677a(e)(2) (1980), Commerce must make a reduction to ESP in the amount of any "expenses generally incurred by or for the account of the exporter." Contrary to Timken's assertion, the site or location at which the selling expenses are incurred is not determinative for making these adjustments under 19 U.S.C. § 1677a(e)(2). *Daewoo Elecs. Co. v. United States,* 13 CIT 253, 270, 712 F. Supp. 931, 948 (1989), *aff'd in part and rev'd in part,* 6 F.3d 1511 (Fed. Cir. 1993).

Commerce having found that the Japanese parent company, NSK Ltd., bore the cost of maintaining the inventory in the United States, there is no reason why the U.S. subsidiary could not have benefitted from its parent's ability to borrow money in the home market at the home market interest rate. *LMI-La Metalli Industriale, S.p.A. v. U.S.,* 912 F.2d 455, 460–61 (Fed. Cir. 1990). Having explained its actions, the Court finds that Commerce's adjustment of FMV for inventory carrying costs was reasonable and in accordance with law and is sustained.

5. *Interest on Underdeposit of Antidumping Duties:*

Commerce did not hold Koyo and NSK liable for interest on underdeposits of antidumping duties assessed on entries of TRBs where they had not been ordered to make cash deposits. *Final Results,* 56 Fed. Reg. at 65,229.

Timken alleges that pursuant to 19 U.S.C. § 1677g (1984), Koyo and NSK are liable for interest on underpayments of amounts deposited to secure antidumping duties, regardless of whether the security was made in the form of bonds or cash. *Timken's Memorandum* at 35–45.

Defendant and defendant-intervenors argue that defendant-intervenors are not liable for interest on underdeposits of antidumping duties because payment of interest is tied to deposits and Koyo and NSK

were not required to make estimated duty deposits upon their entries. *Defendant's Memorandum* at 32–34; *Koyo's Memorandum* at 27–29; *NSK's Memorandum* at 17–18. Commerce agrees, stating:

> The only statutory authorization for assessing or paying interest on underpayments or overpayments of amounts deposited for antidumping duties in section 737(b), which provides that if the amount of an estimated antidumping duty deposited under section 736(a)(3) is different from the amount of the antidumping duty determined under an antidumping duty order issued under section 736, then the difference shall be (1) collected, to the extent that the deposit under section 736(a)(3) is lower than the duty determined under the order, or (2) refunded, the extent that the deposit under section 736(a)(3) is higher than the duty determined under the order, together with interest as provided by section 778. The amount of estimated antidumping duty deposited referred to in section 736(a)(3) is only a cash deposit, not a bond. See also, 19 CFR 353.24. Cash deposits were first required on entries of this merchandise manufactured by Koyo and NSK on June 1, 1990. Consequently, interest will only be collected or refunded on under or overpayments of cash deposits on entries after that date. The Department's interpretation has been upheld by the CIT *(Timken v. United States,* Slip Op. 91–95, October 25, 1991).

Final Results, 56 Fed. Reg. at 65,229.

This issue has already been ruled upon by this Court in *Timken Co. v. United States,* 16 CIT 999, 1001, 809 F. Supp 121, 122–23 (1992) ("[19 U.S.C. § 1677g] is clear on its face that interest is collectable only on deposits and not on bonds"); *see also Timken Co. v. United States,* 15 CIT 526, 535, 777 F. Supp. 20, 27 (1991). This Court adheres to its decision in those cases. Therefore, Commerce's interpretation of the statutory scheme and decision not to impose interest in this case is sustained.

6. *Treatment of TRBs Imported into FTZs:*

Commerce neither included TRBs admitted into a FTZ in this review nor required collection of antidumping duty deposits on the merchandise. *Final Results,* 56 Fed. Reg. at 65,228.

Timken asserts that Commerce should have included in this review all products within the scope of the finding which were admitted to a FTZ or subzone. Timken maintains that Commerce should require respondents to post cash deposits in the amount of the estimated antidumping duties upon all TRBs subject to the scope of this finding admitted to FTZs. *Timken's Memorandum* at 45–55.

Commerce disagrees, and states:

> Under the Department's practice at the time the merchandise subject to this review was admitted into the FTZ the merchandise was not subject to antidumping duties. As we stated in the final results of review on Antifriction Bearings from the Federal Republic of Germany, et al. (56 FR 31703, July 11, 1991), and Tapered Roller Bearings Finished and Unfinished, and Parts Thereof from

> Japan (56 FR 41506, August 21, 1991), our understanding of the term "entry" in the antidumping law is that it unambiguously refers to release of merchandise into the customs territory of the United States. Importers were allowed to elect privileged status of TRBs admitted in FTZs. To the extent that TRBs were admitted into an FTZ in a non-privileged status and transformed into merchandise not subject to the finding before entering U.S. customs territory, the Department currently has no basis for the assessment of antidumping duties on the merchandise.

Final Results, 56 Fed. Reg. at 65,228.

This Court has previously ruled on this issue and adheres to its decision in *Torrington Co.*, 17 CIT at ____, 818 F. Supp. at 1572 (1993); *see also Torrington Co. v. United States*, 17 CIT ____, ____, 826 F. Supp. 492, 494 (1993). This Court finds that the Foreign Trade Zone statute on its face exempts foreign merchandise within a FTZ from the imposition of antidumping duties and from being subject to an antidumping administrative review until that merchandise is brought into the U.S. customs territory, unless some other provision of the Foreign Trade Zone statute or the regulations promulgated thereunder require otherwise. *Torrington Co.*, 17 CIT at ____, 818 F. Supp. at 1572; *see also Torrington* Co., 17 CIT at ____, 826 F. Supp. at 494. At the time of the imports in question, there was no statute or regulation that required that antidumping duties be imposed on merchandise imported into a FTZ or that such merchandise must be subjected to an antidumping administrative review until the merchandise entered U.S. customs territory.

Subsequent to the issuance of the final results at issue, the FTZ Board revised its regulations to provide that merchandise subject to an antidumping or countervailing duty order which enters the FTZ would be marked "privileged" and, thereby, subjected to antidumping and countervailing duty laws. *See* 15 C.F.R. § 400.33(b)(2) (1992).[1]

The merchandise here involved, having been imported into the FTZs as "nonprivileged" merchandise, was transformed in the FTZs into articles not covered by the antidumping duty order on TRBs, and is not subject to the antidumping order. Thus, Commerce's decision on this issue is affirmed.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce: to add to USP the full amount of the home market consumption tax waived or forgiven without a COS adjustment to FMV; to reconsider its treatment of Koyo's commissions while limiting COS adjustments to those commissions which bear a direct relationship to

[1] Section 400.33(b), which became effective April 6, 1992, provides the following:

(b) *Restrictions on items subject to antidumping and countervailing duty actions*—(1) *Board policy.* Zone procedures shall not be used to circumvent antidumping (AD) and countervailing duty (CVD) actions under 19 CFR parts 353 and 355.

(2) *Admission of items subject to AD/CVD actions.* Items subject to AD/CVD orders or items which would be otherwise subject to suspension of liquidation under AD/CVD procedures, if they entered U.S. Customs territory, shall be placed in privileged foreign status (19 CFR 146.41) upon admission to a zone or subzone. Upon entry for consumption, such items shall be subject to duties under AD/CVD orders or to suspension of liquidation, as appropriate, under 19 CFR tarts 353 and 355.

the sales compared; and to deny the adjustment to FMV for home market pre-sale freight expenses where FMV was calculated using purchase price. Commerce's determination is affirmed in all other respects.

Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/71 6/29/94 Tsoucalas, J.	General Electric Co. Medical Systems Group	88–05–00369, 88–11–00857, 89–05–00261	722.13 Various rates	678.50 Various rates	Agreed statement of facts	Milwaukee, WI Multiformat unit or multiformat camera
C94/72 6/29/94 Musgrave, J.	Payless Shoe-source, Inc.	93–03–00147	6402.99.70 90¢/pair and 37.5%	6402.91.40 6%	Agreed statement of facts	Los Angeles, CA Footwear, Protonic Lot. No. 9002
C94/73 6/30/94 Musgrave, J.	La Regale, Ltd.	92–06–00401	4202.22.80 20%	4202.22.40 8.4%	Agreed statement of facts	Newark, NJ Ladies' handbags

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